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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
And
VERTAC CHEMICAL CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

SCOTT E. SLAUGHTER*
SIMON E. DANCE
COFFIELD UNGARETTI & HARRIS
1747 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20006
(202) 872-4310

Counsel for Petitioner, Vertac Chemical Corporation

**Counsel of Record*

WINSTON BRYANT*
ATTORNEY GENERAL and
CHARLES L. MOULTON
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
323 Center Street,
Suite 200
Tower Building
Little Rock, Arkansas
72201-2610
(501) 682-2007

Counsel for Petitioner, Arkansas Department of Pollution Control and Ecology

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

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QUESTIONS PRESENTED

1. Contrary to *Federal Deposit Ins. Corp. v. Meyer*, 114 S.Ct. 996 (1994), may a federal court decide the substantive merits of claims against the United States without ever deciding the United States' sovereign immunity challenge to the court's jurisdiction?

2. Whether the United States' sovereign immunity from claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), is waived in accordance with *Pennsylvania v. Union Gas*, 491 U.S. 8 (1989), when those CERCLA claims are based on the United States' actions and authority under the Defense Production Act and the Walsh-Healey Public Contracts Act?

3. Whether the United States is liable under CERCLA for any environmental cleanup costs at a private contractor's facility when, under the Defense Production Act and the Walsh-Healey Public Contracts Act, the Federal Government compelled the contractor to devote its entire facility to the manufacture of Agent Orange according to the government's own specifications; the government knew that production of Agent Orange generated dioxin-contaminated hazardous wastes; the government was the sole and exclusive customer for Agent Orange; the government controlled the volume of product made and its price; the government controlled the supply and use of raw materials necessary to make the product; and the government had substantial contractual control over the contractor's hazardous waste disposal practices?

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were as follows:

(1) Appellant, the Arkansas Department of Pollution Control and Ecology;

(2) Appellant, the Vertac Chemical Corporation (no parent and no publicly traded subsidiaries or affiliates);

(3) Appellant, Hercules Incorporated (a wholly owned subsidiary, Copenhagen Pectin A/S, a Danish Corporation, in turn owns a forty (40) percent share of Genu Products Philippines, Inc., a Philippines Corporation; the other sixty (60) percent of Genu Products is owned by individuals, but the shares are not traded on any market);

(4) Appellant, Uniroyal Chemical, Ltd. (a wholly owned subsidiary; Parent: Uniroyal Chemical Company, Inc.; Ultimate Parent: Uniroyal Chemical Corporation); and

(5) Appellee, The United States of America.

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UNITED STATES OF AMERICA,
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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Arkansas Department of Pollution Control and Ecology ("State of Arkansas") and the Vertac Chemical Corporation ("Vertac") hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this action on January 31, 1995.

PREVIOUS OPINIONS

A reprinted copy of the opinion of the United States Court of Appeals for the Eighth Circuit, entered January 31, 1995, reported as *United States of America v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995), is attached hereto as Appendix A.

A reprinted copy of the Order entered October 7, 1993, in *United States v. Vertac Chem. Corp.*, Civil Action Nos. LR-C-

80-109 and LR-C-80-110, in the United States District Court for the Eastern District of Arkansas, Western Division, is attached hereto as Appendix B.

A reprinted copy of the Memorandum Opinion and Order of the District Court entered October 12, 1993, reported as *United States v. Vertac Chem. Corp.*, 841 F. Supp. 844 (E.D. Ark. 1993), is attached hereto as Appendix C.

A reprinted copy of the Judgment of the District Court, entered March 1, 1994, is attached hereto as Appendix D.

GROUNDS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 to review by writ of certiorari the judgment of the United States Court of Appeals for the Eighth Circuit dated January 31, 1995, which is the subject of this Petition.

STATUTES AND REGULATIONS

The provisions of the statutes and regulations involved in this case are lengthy. Accordingly, pursuant to Rule 14(f) of the Rules of the Supreme Court of the United States, their individual citations are set forth below, and the pertinent text is reprinted and attached hereto as Appendix E.

Statutes

28 U.S.C. § 1254;

28 U.S.C. § 1331;

28 U.S.C. § 1346(b);

28 U.S.C. § 2674;

CERCLA Section 101(20)(A), 42 U.S.C. § 9601(20)(A);

CERCLA Section 101(21), 42 U.S.C. § 9601(21);

CERCLA Section 107(a)(2), 42 U.S.C. § 9607(a)(2);

CERCLA Section 107(a)(3), 42 U.S.C. § 9607(a)(3);

CERCLA Section 113, 42 U.S.C. § 9613;

CERCLA Section 120(a)(1), 42 U.S.C. § 9620(a)(1);

Defense Production Act, Section 101(a), 50 U.S.C. app. § 2071(a);

Defense Production Act, Section 103, 50 U.S.C. app. § 2073;

Walsh-Healey Public Contracts Act, Section 35(e), 41 U.S.C § 35(e);

Walsh-Healey Public Contracts Act, Section 36, 41 U.S.C. § 36;

Walsh-Healey Public Contracts Act, Section 37, 41 U.S.C. § 37; and

Walsh-Healey Public Contracts Act, Section 43a(c), 41 U.S.C. § 43 a(c).

Regulations

The Business and Defense Services Administration's ("BDSA's") regulations implementing the Defense Production Act ("DPA"):

32A C.F.R., Chapter VI, BDSA Reg. 2, §§ 1, 3, 16, & 27;

40 C.F.R. § 302.4 (1993);

The United States Department of Labor's regulations implementing the Walsh-Healey Public Contracts Act ("Walsh-Healey Act"):

41 C.F.R. § 50-204.1(a)-(e) (1960);

41 C.F.R. § 50-204.233 (1960); and

41 C.F.R. § 50-204.234 (1960).

STATEMENT OF THE CASE

The United States' Authority And Control Over Hercules's Production And Disposal Of Agent Orange

During the period 1964 through 1968, Hercules Incorporated ("Hercules") produced millions of gallons of Agent Or-

[1] Agent Orange is composed of equal parts of the undiluted n-butyl esters of 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T") and 2,4-dichlorophenoxyacetic acid ("2,4-D"). Both 2,4,5-T and 2,4-D are listed as hazardous substances under CERCLA.

ange[1] at its Jacksonville, Arkansas, herbicide plant (the "Jacksonville Plant") pursuant to government contracts with the United States.[2] The Department of Defense ("DOD") used this Agent Orange as a defoliant in the Vietnam War. The DOD developed and provided to Hercules the product specifications for Agent Orange. The United States also dictated the price it would pay for Agent Orange. Although Hercules separately produced the components of Agent Orange for its private customers, it produced Agent Orange solely and exclusively for the DOD.[3]

Hercules's production of Agent Orange for the DOD generated a "'staggering' amount of waste," and increased the amount of waste generated at the plant.[4] The Agent Orange waste was contaminated with high levels of dioxin and other CERCLA hazardous substances.[5] In addition to all of its other production wastes, Hercules buried much of the dioxin-contaminated Agent Orange waste at the Jacksonville Plant.[6] This Agent Orange waste remains there today. The United States Environmental Protection Agency ("EPA") estimated that the

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[2] Several federal entities were involved in the production of Agent Orange at the Arkansas Superfund Sites. Unless the context requires otherwise, they will be referred to collectively as the "United States" in order to avoid confusion.

[3] Joint Appendix ("J.A.") at 02591, 02594, 02168, 05853-56, 05858. J.A. refers to the Joint Appendix, Volumes 1-XXIII, filed in the proceeding before the United States Court of Appeals for the Eighth Circuit.

[4] J.A. at 05878-81.

[5] 2,3,7,8-tetrachlorodibenzo-para-dioxin, or TCDD, is considered the most toxic isomer of the family of chemicals known as dioxins. TCDD is a byproduct of the 2,4,5-T manufacturing process.

[6] J.A. at 05878. Hercules admitted that it buried all of its production wastes on-site during the entire time that it owned and operated the Jacksonville Plant: December 28, 1961, to September 30, 1971. *Id.*

total remedial costs for the Jacksonville Plant and its associated Superfund Sites (hereinafter referred to collectively as "Arkansas Superfund Sites") could exceed $150 million.[7]

Hercules made Agent Orange for the United States at the Jacksonville Plant pursuant to directives and rated order contracts issued under the DPA. These directives and rated order contracts were issued by the BDSA, a branch of the United States Department of Commerce. The DPA authorizes the United States to require acceptance and performance of supply contracts which the President deems necessary or appropriate for national defense. Willful failure to accept and perform these DPA contracts is a criminal offense, punishable by imprisonment and fines. The United States may also obtain injunctions requiring that rated orders and directive contracts be accepted and performed. Rated order and directive contracts have priority over any private contract. They must be accepted and fully performed even if their performance requires that preexisting private contracts are abrogated.[8]

At first, Hercules did not object to the Agent Orange contracts. In 1967, however, the United States ordered Hercules under the DPA to devote its entire Jacksonville Plant to the production of Agent Orange for the DOD. Hercules requested relief from this order on the ground that to comply might destroy its private herbicide market, which did not include any Agent Orange customers. The United States denied Hercules's request for relief from this order, and Hercules complied with it.[9]

During the time Hercules made Agent Orange for the DOD, Hercules was required to comply with standards promulgated

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[7] *E.g., United States v. Vertac Chem. Corp.*, 671 F. Supp. 595, 608-09 (E.D. Ark. 1987), *vac'd*, 855 F.2d 856 (8th Cir. 1987); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870 (D. Ark. 1980).

[8] E.g., 50 U.S.C. app. § 2073; 32A C.F.R., Chapter VI, BDSA Reg. 2, §§ 1, 3, 16, & 27, reprinted in Appendix E to this Petition at E-8 to E-10.

[9] J.A. at 00190, 02215-16, 02218, 02586-88, 02596, 02911-12.

by the United States Department of Labor ("DOL") under the Walsh-Healey Act. The Walsh-Healey Act standards only applied to government contracts for the supply of goods in excess of $10,000. These standards were incorporated as terms of the Agent Orange contracts.[10] If a government contractor violated any of the Walsh-Healey Act standards, then the United States could: (i) terminate its contract with the contractor; (ii) sue the contractor for any damages caused the government by the contractor's failure to comply with the standards; and (iii) debar the contractor from any other government contract for three years.[11]

The Walsh-Healey Act standards imposed specific Agent Orange waste disposal requirements on Hercules.[12] During the time Hercules made Agent Orange for the DOD, the United States' inspectors frequently visited the Jacksonville Plant. Hercules disposed of the Agent Orange wastes in plain view of anyone at the site. Further, the United States had actual knowledge that the toxic wastes generated during the production of Agent Orange could cause pollution problems and employee health problems. The United States knew that the production of Agent Orange would generate dioxin as a byproduct. The United States Army had actually considered using 2,4,5-T wastes as a chemical warfare agent. 2, 4, 5-T is one of the components of Agent Orange.[13]

For its part in the manufacture of Agent Orange at the Jacksonville Plant, Hercules has been found jointly, severally,

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[10] *Id.* at 02942; Appendix E at E-3.

[11] 41 U.S.C. §§ 36, 37; Appendix E at E-4. The EPA's Chief Hearing Officer for government contractor debarment and suspension recently described these sanctions as "extremely potent authorities." David Sims, *Suspension and Debarment: Potent Government Tools*, SONREEL News, ABA Sec. Nat. Res., Energy, and Envtl. L. (January/February 1994).

[12] These waste disposal standards are reprinted and set forth in Appendix E to this Petition at E-8.

[13] *E.g.*, J.A. at 00319-320, 02918-21, 03215, 03220-21, 05855.

and strictly liable under CERCLA. Although the State of Arkansas claims that the United States is also liable under CERCLA for some portion of the Arkansas Superfund Sites' cleanup costs, it has never claimed that the United States is liable for all of those costs. If the United States is held liable under CERCLA, its share of liability will be determined later through trial or settlement.

The Courts Below Failed To Decide The United States' Sovereign Immunity Issue

In the District Court, the State of Arkansas, Vertac, and Hercules claimed that the United States was liable for cleanup costs at the Arkansas Superfund Sites both as an "operator" under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), and as an "arranger" under Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3). These CERCLA claims were based on the United States' actions and authority during the production and disposal of Agent Orange at the Jacksonville Plant, which is one of these sites. The State of Arkansas, Vertac, and Hercules filed summary judgment motions on their claims. In response, the United States filed a cross motion for summary judgment, raising a threshold jurisdictional issue: the United States argued that its sovereign immunity from CERCLA liability had not been waived for purposes of the claims in this case. In the alternative, the United States asserted that even if its sovereign immunity had been waived, it was not liable under CERCLA as either an "operator" or an "arranger." The District Court granted the United States' summary judgment motion on the merits, without ever addressing the sovereign immunity issue.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's opinion. In reaching its conclusions on the merits, the Eighth Circuit Court of Appeals neither addressed its own jurisdiction nor the District Court's failure to decide the United States' sovereign immunity argument. Rather, the Eighth Circuit stated that its "conclusions

[on the merits] that the United States is neither an operator nor an arranger under CERCLA obviates the need to address the United States' sovereign immunity arguments." *Vertac*, 46 F.3d at 811 n.10.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

If the United States' sovereign immunity was waived, then the District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613. However, both the District Court and the Eighth Circuit Court of Appeals failed to determine whether there was a waiver of sovereign immunity, even though the United States vigorously argued that there was no waiver.

REASONS FOR GRANTING THE WRIT

First and foremost, this writ should be granted because the opinions below squarely conflict with over 190 years of Supreme Court precedents requiring federal courts to determine whether they have jurisdiction to decide the merits of claims. The District Court completely ignored the threshold jurisdictional issue raised by the United States in this case: whether the United States' sovereign immunity from CERCLA liability had been waived. The Eighth Circuit compounded the lower court's error and held in a footnote that it could decide the merits of this case without deciding the United States' challenge to its subject matter jurisdiction. This holding conflicts with numerous Supreme Court opinions, including the recent opinion in *Federal Deposit Ins. Corp. v. Meyer*, 114 S.Ct. 996 (1994).

In *Meyer*, Justice Thomas explained for a unanimous court that:

> Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *Federal Housing Admin. v. Burr*, 309 U.S. 242, 244 (1940). Sovereign

> immunity is jurisdictional in nature. Indeed, the "terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). *See also United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction"). **Therefore, we must first decide whether [the Federal Government's] immunity has been waived.**

Id. at 1000 (emphasis added).

As then Circuit Judge Thomas explained in an earlier case before the District of Columbia Circuit:

> Read in light of one hundred and eighty-seven years of other precedents, the Supreme Court's opinions . . . confirm that federal courts must first assure themselves that they have authority to hear a dispute before they may decide the dispute on the merits.
>
> . . .
>
> Federal courts simply may not assume jurisdiction hypothetically. Some cases might cry out for decision on the merits; some might pose difficult jurisdictional problems. Our threshold duty to examine our own jurisdiction is no less obligatory in either instance.[14]

Many pending cases present the same issue of the United States' sovereign immunity from CERCLA liability. According to the Federal Government, it is defending "nearly two dozen [24]" such cases.[15] The Eighth Circuit's opinion is now prece-

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[14] *Cross-Sound Ferry Services, Inc. v. Interstate Commerce Comm'n*, 934 F.2d 327, 346 (D.C. Cir. 1991) (Thomas, J., dissenting) (citing *FW/PBS, Inc. v. City of Dallas*, 439 U.S. 215, 231-35 (1990); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990)).

[15] Transcript of Appellant's, United States', oral argument at 9, *FMC Corp. v. United States* (3rd Cir. *en banc*) (No. 92-1945) (April 26, 1994).

dent for other courts to ignore this jurisdictional issue when reviewing these CERCLA claims against the United States. Moreover, the jurisdictional issue presented by this case transcends CERCLA. If this writ is not granted, the Eighth Circuit's opinion can and will be cited as precedent for any federal court to decide the merits of any claim without ruling on challenges to the court's jurisdiction to hear that claim. Petitioner, State of Arkansas, has a special interest in this issue because it too has sovereign immunity from suit unless that immunity has been unequivocably waived.

This writ should also be granted because the lower courts need guidance clarifying when the United States can be sued and when the United States is liable under CERCLA. The Eighth Circuit Court of Appeals held in this case that the United States was not liable, without deciding the sovereign immunity jurisdictional issue. In contrast, the Third Circuit in *FMC Corp. v. United States Dept. of Comm.*, 29 F.3d 833 (3rd Cir. 1944) *(en banc)*, correctly decided the sovereign immunity issue first, finding that there was a waiver, and then held that the United States was liable under CERCLA in a case which involved the same or similar issues as here.[16] In both cases, the United States identified many other pending proceedings which involve the same or similar questions of Federal Government CERCLA liability.[17] The United States believes that these cases could result in "massive" Federal Government liability.[18] The threshold question in all these other pending cases is the sovereign immunity and jurisdictional issue presented by this case. The lower courts, therefore, urgently need this Court's review and guidance on these CERCLA liability issues.

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[16] *FMC*, 29 F.3d at 842.

[17] *See Id.* at 846; Appellee's, United States', Petition for Rehearing and Suggestion of Rehearing *In* [sic] *Banc*, at 14 and n.6, and Addendum A thereto at 20, *FMC Corp. v. United States*, 29 F.3d 833 (3rd Cir. 1994) (*en banc*).

[18] *FMC*, 29 F.3d at 846.

This writ should be also granted because there is a conflict among the circuit courts as to whether an "authority to control" or an "actual control" standard should be used to determine "operator" liability under CERCLA Section 107(a)(2), 42 U.S.C. § 9607(a)(2). Even those circuits that have adopted the "actual control" standard conflict in its application. These conflicts present important questions of federal law that affect many pending cases, including cases where the United States is not a defendant.

Finally, this Court has already granted certiorari to review Hercules's Agent Orange claims in an appeal from the Federal Circuit. In this separate but related case, Hercules contends that the United States is required by the DPA to indemnify Hercules for its settlement of the Agent Orange product liability claims against it. *Hercules Inc. v. United States*, 24 F.3d 188 (Fed. Cir. 1994), *cert. granted*, 63 U.S.L.W. 3717 (U.S. April 4, 1995) (No. 94-818). Hercules has also petitioned this Court to review the Eighth Circuit's CERCLA liability decision.[19] In its Eighth Circuit petition, Hercules raises DPA and CERCLA indemnification questions that are closely related to the questions the Supreme Court has already decided to review in the Agent Orange product liability settlement case from the Federal Circuit.

The United States' authority and actions under the DPA also form part of the basis for the Petitioners' CERCLA claims against the United States here. Consequently, the Supreme Court's decision in Hercules's Federal Circuit case will impact the CERCLA claims against the United States. The coextensive interests of judicial economy and uniformity thus require that the two cases be reviewed together. A resolution of these related DPA cases will not, however, resolve the conflict among the

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[19] *United States of America v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995), *petition for cert. filed sub nom., Hercules Inc. v. United States*, 63 U.S.L.W. ___ (U.S. March 21, 1995) (No. 94 -___).

circuits over the standards for CERCLA liability. Nor will it resolve the issue of when the United States' sovereign immunity is waived under CERCLA. These issues directly affect many pending suits. Therefore, all of the questions raised in this Petition should be reviewed by the Supreme Court.

ARGUMENT

The Courts Below Failed To Comply With Their Duty To Determine Whether They Had Jurisdiction To Review These Claims

Contrary to a long line of applicable Supreme Court precedents, spanning some 190 years, the District Court failed to examine -- or even comment on -- its jurisdictional power to adjudicate the merits of the claims before it, even though the United States explicitly challenged its jurisdiction. On appeal to the Eighth Circuit, the United States argued that:

> Congress did not consent to suit against the federal government on such sovereign matters, and thus, even if Hercules and Vertac could prove that the United States had the authority to control Hercules' operations . . . **this Court would lack jurisdiction to consider Hercules' and Vertac's claims.**[20]

Notwithstanding the United States' jurisdictional argument, the Eighth Circuit Court of Appeals sanctioned the lower court's extreme departure from the accepted and usual course of judicial proceedings by ignoring its omission, and by relegating the threshold jurisdictional question to a mere footnote: "Our conclusions [on the merits] that the United States is neither an operator nor an arranger under CERCLA **obviates the need to address the United States' sovereign immunity arguments."** *Vertac*, 46 F.3d at 811 n.10 (emphasis added).

Both the District Court and the Eighth Circuit are wrong. A federal court's threshold examination of its own jurisdiction

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[20] Brief for Appellee, United States, at 36, *United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995) (emphasis added).

is not discretionary. As Justice Scalia admonished in *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990):

> This will not do. Since [diversity of citizenship] is a jurisdictional requirement, the Court is always 'called upon to decide' it.

The Supreme Court reiterated this tenet in *FW/PBS, Inc.*, 493 U.S. 215, 231-235 (1990) and, most recently, in *Meyer*, where Justice Thomas stated for a unanimous court that because the question of the United States' consent to be sued is jurisdictional, the Supreme Court "**must first decide** whether [the government agency's] immunity has been waived." 114 S.Ct. at 1000 (emphasis added).

It is axiomatic that neither the United States nor any other sovereign may be sued without its consent. It is also axiomatic that sovereign immunity is jurisdictional in nature. Indeed, the "terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." *Meyer*, 114 S.Ct. at 1000 (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941) and *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Moreover, the Supreme Court has consistently held that federal courts are courts of limited jurisdiction; thus "every federal appellate court has a special obligation to 'satisfy itself [at the outset] not only of its own jurisdiction, but also that of the lower courts in a cause under review'. . . ." *FW/PBS, Inc.*, 493 U.S. at 231 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984) and *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

This "special obligation" of the federal courts to appraise, as a threshold question, their own jurisdiction is without regard to whether the parties, or the lower courts, have raised any jurisdictional questions themselves. *FW/PBS, Inc.*, 493 U.S. at 231; *Carden*, 494 U.S. at 196; *see* Fed. R. Civ. P. Rule 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). As the Supreme Court, per Justice

O'Connor, explained in *FW/PBS, Inc.*, "Neither the District Court nor the Court of Appeals determined whether the petitioners had standing . . . Although neither side raises the issue here, **we are required to address the issue** even if the courts below have not passed on it." 493 U.S. at 231 (emphasis added) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)). "The federal courts are under an independent obligation to examine their own jurisdiction . . . ." *Allen*, 468 U.S. at 750.

In *Carden*, relying on a long line of the Supreme Court's earlier decisions, the majority concluded:

> [T]he failure of parties to urge objections [to diversity of citizenship] cannot relieve this court from the duty of ascertaining from the record whether the Circuit Court could properly take jurisdiction of this suit . . . . **'The rule . . . is inflexible and without exception,** which requires this court, on its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.'

494 U.S. at 196 (emphasis added) (citing *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900) (quoting *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

Moreover, in *Meyer*, this Court unanimously reaffirmed that absent assuring itself that it has actual jurisdiction, a court has no authority or power to proceed. 114 S.Ct. at 1000.

In an eloquently expressed dissent on this very question, then Circuit Judge Thomas wrote in a case before the District of Columbia Circuit:

> The truistic constraint on the federal judicial power, then, is this: A federal court may not decide cases

> when it cannot decide cases, and must determine whether it can, before it may. The majority here changes this fundamental precept to read, in effect, that under certain circumstances a federal court should decide cases regardless of whether it can, and need not determine whether it can, before it does. This revision . . . [is] difficult to square with the Supreme Court's regular warnings to the federal courts to fulfill their "special obligation" to inquire into their own jurisdiction at the outset.

Cross-Sound Ferry Services, 934 F.2d at 340 (citing *Capron v. Van Noorden*, 6 U.S. (2 Cranch) at 127 and *Mansfield*, 111 U.S. at 382).

Following a detailed historical review, Judge Thomas correctly concluded that "not a single Supreme Court case authorizes federal courts to shuffle around unambiguously jurisdictional problems in order to issue judgments unambiguously on the merits." *Cross-Sound Ferry*, 934 F.2d at 345.[21] This conclusion remains true today. In fact, the Supreme Court in *Meyer* expressly buttresses this opinion by holding that the first and fundamental question is that of jurisdiction: "whether FSLIC's sovereign immunity was waived." 114 S.Ct. at 1000 (citations omitted); *accord Carden*, 494 U.S. at 196; *FW/PBS, Inc.*, 493 U.S. at 231-32 (dismissing claim for lack of U.S. Const. art. III standing).

In the present case, the United States extensively briefed and argued that the courts below lacked jurisdiction to review the CERCLA claims against the government because there had been no waiver of its sovereign immunity. Yet, neither the District Court nor the Eighth Circuit examined its own jurisdic-

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[21] *See also* Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. Pa. L. Rev. 712, 745 (1979) ("there is. . . no Supreme Court opinion unequivocally holding that it is permissible to assume justiciability and rule on the substantive merits").

tion prior to proceeding to the merits, in direct conflict with a long line of Supreme Court precedents. Although the Petitioners assert that the United States' sovereign immunity argument is wrong on the facts of this case, the courts below still had no choice: they had a duty to decide this threshold jurisdictional question first in order to determine whether they could decide the merits. The lower courts' failure to examine their own jurisdiction in this case is clear error on one of the most fundamental of all federal questions.

The United States' Sovereign Immunity Was Waived

Section 107(a)(2) and Section 107(a)(3) of CERCLA state that any "person" who is an operator or an arranger is liable.[22] The term "person" is defined to include the "United States.[23] Section 120(a)(1) of CERCLA states that:

> Each department, agency, and instrumentality of the Federal Government [including the executive, legislative and judicial branches of government] shall be subject to, and comply with this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section [107] of this title.[24]

In *Pennsylvania v. Union Gas*, 491 U.S. 8 (1989), the Supreme Court construed these provisions when it held that the States' Eleventh Amendment immunity from CERCLA liability had been abrogated. The Supreme Court explained that Section 120(a)(1) of CERCLA is:

> **[D]oubtless an "unequivoca[l] express[ion]" of the Federal Government's waiver of its own sovereign immunity, ... since we cannot imagine any other plausible explanation for this unqualified language.**

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[22] 42 U.S.C. §§ 9607(a)(2), 9607(a)(3).

[23] *Id.* § 9601(21).

[24] *Id.* § 9620(a)(1).

> It can be no coincidence that in describing the potential liability of the States in § 101(20)(D), Congress chose language mirroring that of § 120(a)(1), therefore, Congress must have intended to override the State's immunity from suit, **just as it waived the Federal Government's immunity in § 120(a)(1).**

491 U.S. at 10 (emphasis added) (citations omitted).

Notwithstanding the Supreme Court's explicit finding of an "unequivoca[l]" waiver, the United States argued below that it is immune from CERCLA liability whenever, as here, the Walsh-Healey Act is involved because the United States' Walsh-Healey Act authority is purely regulatory.[25] This misinterpretation of the Walsh-Healey Act conflicts with *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128-29 (1940) (emphasis added), wherein the Supreme Court explained that the Walsh-Healey Act:

> **[D]oes not represent an exercise by Congress of regulatory power over private business or employment.** In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal.

The United States made a similar sovereign immunity argument in *FMC*, which involved Government control over the product made at a private facility under federal "war powers" statutes analogous to the DPA. The Third Circuit in *FMC* correctly rejected this sovereign immunity argument because it had no basis in CERCLA, its legislative history, or the case law. 29 F.3d at 839-40. The *FMC* court also correctly looked to

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[25] Brief for Appellee, United States, at 33-36, *United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995).

Supreme Court opinions interpreting the sovereign immunity waiver in the Federal Tort Claims Act, 28 U.S.C. §§ 1346 (b), 2674, for guidance in determining the scope of CERCLA's similar sovereign immunity waiver. *FMC*, 29 F.3d at 840. In these cases, the Supreme Court rejected the government's argument that there is a "uniquely governmental" function exception to the FTCA's sovereign immunity waiver. *See, e.g., Rayonier, Inc. v. United States*, 352 U.S. 315, 318-20 (1957) (United States' sovereign immunity waived by FTCA for claims based on negligence of federal employees acting as public firemen); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (United States' sovereign immunity waived by FTCA for claims based on Coast Guard's negligence in operating lighthouse). The Third Circuit correctly found *Indian Towing* controlling on the CERCLA sovereign immunity issue on facts similar to those in this case: *i.e.*, pervasive Federal Government control over a private contractor's operation of a facility in order to guarantee production of material needed by the United States. 29 F.3d at 840.

The extent of the United States' control over Hercules at the Jacksonville Plant was perhaps best summarized by the dissent in the Federal Circuit's Agent Orange settlement indemnification opinion, review of which was granted by the Supreme Court at its April 3, 1995, session:[26]

> The Government took away appellants' [including Hercules] control over their businesses. By assuming control, the Government deprived appellants of their ability to conduct themselves prudently, and instead forced appellants to engage in a dangerous enterprise, the manufacture of Agent Orange.[27]

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[26] *Hercules Inc. v. United States*, 24 F.3d 188 (Fed. Cir. 1994), *cert. granted*, 63 U.S.L.W. 3717 (U.S. April 4, 1995) (No. 94-818).

[27] *Hercules Inc. v. United States*, 24 F.3d at 210 (Plager, C.J., dissenting).

If a private party had exercised this type of control over a Superfund site, it should and would be liable under CERCLA for some portion of that site's cleanup costs. Congress did not intend a different result when the United States is the controlling party. *See FMC*, 29 F.3d at 840 ("when the government engages in activities that **would** make a private party liable **if** the private party engaged in those types of activities, then the government is also liable . . . even if no private party could in fact engage in those specific activities") (emphasis in the original).

The United States Is Liable As A CERCLA Operator

The Circuits Conflict On The Control Standards For CERCLA Operator Liability

Under Section 107(a)(2) of CERCLA, the United States is liable for cleanup costs at the Arkansas Superfund Sites if there was a sovereign immunity waiver, and if the United States was an "operator" of the Jacksonville Plant during the time Hercules made Agent Orange there. 42 U.S.C. § 9607(a)(1)(4). The statute itself provides no guidance on the meaning of the term "operator."[28] The legislative history is also unilluminating on the meaning of this term.

Predictably, this ambiguity has led to conflict among the circuits as to who is an "operator" for purposes of CERCLA liability. The United States Court of Appeals for the Fourth Circuit has adopted an "authority-to-control" standard, holding that an individual defendant "need not have exercised actual control in order to qualify as an operator under [CERCLA] so long as the **authority** to control the facility was present." *United States v. Carolina Transformer Co.*, 978 F.2d 832, 836-37 (4th Cir. 1992) (emphasis added) (quoting *Nurad, Inc. v. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.), *cert. denied*, 113 S.Ct.

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[28] The statutory definition of operator reads in relevant part: "The term owner or operator means . . . any person owning or operating such facility." 42 U.S.C. § 9601 (20)(A).

377 (1992)). Several district courts have also adopted this "authority-to-control" standard for CERCLA operator liability.[29]

Conversely, the Eighth Circuit, the Third Circuit, and other courts have adopted an "actual control" test for CERCLA operator liability. Under this "actual control" liability standard:

> [A] plaintiff must prove that an individual defendant had actual responsibility for, involvement in, or control *over* the disposal of hazardous waste at a facility *See Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994) (holding that plaintiff must allege that individual defendant "directly and personally engaged in conduct that led to specific environmental damage at issue"); *Riverside Market Devel. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.) (holding that proper focus is "the extent of [individual] defendant's personal participation in the alleged wrongful conduct"), *cert. denied*, 112 S.Ct. 636 (1991); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (1st Cir. 1985) (holding that individual defendant was an "operator" because he was "in charge of the operation of the facility"); *see also Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1454, 1457 (N.D. Cal. 1991) ("an individual cannot be liable as an 'operator' under CERCLA Section 107(a)(2) [42 U.S.C. § 9607(a)(2)] unless that individual actually participates in the operation of the facility at which

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[29] *See, e.g., Northwestern Mut. Life Ins. Co. v. Atlantic Research Corp.*, 847 F. Supp. 289, 397 (E.D. Va. 1994) (holding that an individual defendant may be liable if she has the authority to control activities on the facility); *Robert-Shaw Controls Co. v. Watts Regulator Co.*, 807 F. Supp. 144, 152-53 (D. Me. 1992) (holding that liability is proper if an individual defendant had authority such that she could have prevented the hazardous waste discharge).

> hazardous substances are disposed of, exercised control over the company immediately responsible for the operation of that facility, or is otherwise intimately involved in that company's operations").

United States v. Gurley, 43 F.3d 1188, 1192-93 (8th Cir. 1994) (emphasis in the original).

The Eighth Circuit specifically acknowledged this conflict among the circuits when it first adopted the "actual control" standard for operator liability in *Gurley*. *Id.* at 1192-93. The Eighth Circuit also applied the "actual control" standard in this case when it held that the United States was not liable as a CERCLA operator. *Vertac*, 46 F.3d at 809.

The Eighth Circuit Erred In Adopting The "Actual Control" Standard For CERCLA Operator Liability

The conflicting "authority-to-control" standard adopted by the Fourth Circuit is consistent with congressional intent because it "properly declines to absolve from CERCLA liability a party who possessed the authority to abate the damage caused by the disposal of hazardous substances but who declined to actually exercise that authority by undertaking efforts at a cleanup." *Nurad*, 966 F.2d at 842. Here, the United States had contractual authority to control Hercules's Agent Orange waste disposal under the Walsh-Healey Act and the DPA. One of the DOL's Walsh-Healey Act standards required that "all solid or liquid waste . . . shall be removed in such a manner as to avoid creating a nuisance or menace to health . . . ."[30] Other Walsh-Healey Act standards expressly governed waste disposal. One standard was entitled "receptacles for waste disposal," and required that such receptacles not leak.[31] Another standard prohibited any working condition which "a rational and prudent

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30 41 C.F.R. § 50-204.234 (1960); Appendix E at E-8.

31 Id. § 50-204.233; Appendix E at E-8.

person of common experience" would believe "hazardous or dangerous to the health and safety of employees."[32]

As the Supreme Court explained in *Perkins*, the DOL had a "duty" to require compliance with the Walsh-Healey Act Standards. 310 U.S. at 128-29. Consequently, the DOL often brought administrative enforcement actions against government contractors whose waste disposal practices violated the Walsh-Healey Act standards.[33] Here, however, the Federal Government failed -- without cause -- to comply with its statutory duty at the Jacksonville Plant. In so doing, the Federal Government allowed Hercules to dispose of the Agent Orange wastes in a manner which clearly violated the Walsh-Healey Act standards.

Ten years after Hercules ceased making Agent Orange for the Federal Government, the United States claimed, under federal statutes other than the Walsh-Healey Act, that Hercules's disposal of the Agent Orange wastes was negligent, caused a nuisance, and caused an imminent and substantial endangerment to human health and the environment.[34] That negligence, nuisance, and endangerment also violated the Walsh-Healey Act standards, which were terms of the Agent Orange contracts. The United States thus had both contractual authority and a duty to prevent them from occurring.[35] The United States had no

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[32] Id. § 50-204.1(d); Appendix E at E-7.

[33] *E.g.*, J.A. at 03081, 03089, 03117, 03129-30. For example, in one of these actions, the DOL's Hearing Examiner concluded that the Walsh-Healey Act standards were violated because "[s]olvents were dumped into a ditch adjacent to the plant where they constituted a fire hazard." J.A. at 03081.

[34] J.A. at 00561-00625, 00813-00818, 03321. The United States brought claims against Hercules pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.*, and the Clean Water Act, 33 U.S.C. §§ 1251-1376.

[35] Perkins, 310 U.S. at 128-29. The DOL's own rules required that it enforce compliance with the standards. 40 C.F.R. § 50-203.1. In 1952, Congress amended the Walsh-Healey Act to allow "any interested party," including plant employees, to seek judicial review

excuse for not fulfilling its duty. Hercules buried the Agent Orange wastes at the Jacksonville Plant in plain view of anyone at the plant.[36] And various United States' representatives visited the plant site almost 200 times during Hercules's production of Agent Orange.[37]

The Eighth Circuit Improperly Applied The "Actual Control" Standard For CERCLA Operator Liability

Even under an "actual control" standard, the Eighth Circuit erred because the United States is liable as an operator under that standard as correctly interpreted by the Third Circuit. In *FMC*, the Third Circuit concluded that the United States was liable as a CERCLA operator under an "actual control" standard because:

> [T]he leading indicia of control were present, as the government determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold. . . . In these circumstances, we must conclude that the government was an operator of the facility for purposes of CERCLA liability.

FMC, 29 F.3d at 843.

The identical "leading indicia of control" are present here. The United States determined the specifications and the product (Agent Orange) that Hercules would produce at its Jacksonville Plant by issuing DPA directives and rated order contracts. The

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of whether the DOL was properly applying the Act at a particular contractor's facility; thus, the standards were judicially enforceable through what were, in effect, citizen suits. 41 U.S.C. § 43a (c); *Wirtz v. Baldor Electric Co.*, 337 F.2d 518, 532-33 (D.C. Cir. 1963); *George v. Mitchell*, 282 F.2d 486, 488-89 (D.C. Cir. 1960); 41 U.S.C.A. § 43(a), Historical and Statutory Notes (quoting Conference Report No. 2352); 98 Cong. Rec. 6246 (May 29, 1952).

[36] J.A. at 05855.

[37] J.A. at 00319-320, 02918-02921, 03215, 03220-03222, 05855.

United States could have forced Hercules to accept these directives and rated orders through injunctions and criminal penalties. In 1967, the United States issued a directive which required Hercules to devote the Jacksonville Plant's entire production capacity to the sole and exclusive production of Agent Orange for the DOD. Hercules requested relief from this 1967 directive on the ground that to comply might destroy its private herbicide market, which did not include Agent Orange. Hercules's request for relief was denied by the United States, and Hercules complied with the directive.[38] Thus, the United States determined both the product and the level of production by mandating that Hercules devote its entire plant to the production of Agent Orange for the DOD, a product for which Hercules had no private customers.

By issuing the DPA directives and rated order contracts, the United States also determined the price of the product, and determined to whom the product would be sold: the sole and exclusive customer was the United States.[39]

In addition to the "leading indicia of control," the United States also controlled Hercules's supply and use of raw materials. Tetrachlorobenzene ("TCB") is necessary to produce Agent Orange. Because TCB was in short supply during the time Hercules made Agent Orange, the United States ordered Hooker Chemical ("Hooker") to devote its entire TCB production capacity to supply Agent Orange producers. In 1967, the United States issued a DPA directive that ordered Hooker to make and deliver specified amounts of TCB to Hercules on specified dates. This DPA directive was enforceable against Hooker by injunctive relief and criminal penalties. Under its rated order contracts and the DPA directives, Hercules was required to use the Hooker-directive TCB to make Agent Orange for the DOD.

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[38] *E.g.*, J.A. at 00190, 02215-16, 02218, 02586-88, 02596, 02911-13.

[39] J.A. at 05853-56, 05858.

Hercules could not use this TCB for any other purpose.[40] TCB is a CERCLA hazardous substance.[41]

In sum, the same "leading indicia of control" for purposes of the "actual control" standard are present in this case, as they were in *FMC*. The *FMC* Court held the United States liable as a CERCLA operator under the "actual control" standard. Yet the Eighth Circuit held that the United States was not liable as a CERCLA operator under the same standard. Thus, not only is there a conflict among the circuits as to what standard to use for "operator" liability, but there is also a conflict between those circuits that have adopted the "actual control" standard.

The United States is Also Liable As A CERCLA Arranger

Under Section 107(a)(3) of the CERCLA, the United States is liable for the clean-up costs of the Arkansas Superfund Sites as an "arranger" if there was a waiver of sovereign immunity, and if the United States "arranged for treatment or disposal" of hazardous substances which it "owned or possessed" during the time Hercules made Agent Orange at the Jacksonville Plant. 42 U.S.C. § 9607(a)(3). The statute is equally ambiguous with regard to the meaning of "arranged for treatment or disposal" and "owned or possessed" as it is in regard to the meaning of "operator." For example, CERCLA does not define the term "possessed." Faced with this ambiguity, the lower courts have agreed with the Department of Justice that "arranger" liability should be broadly construed in order to achieve CERCLA's "overwhelmingly remedial statutory scheme."[42]

The United States is liable as a CERCLA arranger under the requisite liberal interpretation of these terms. With respect

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[40] J.A.at 02915, 02991, 03074, 03219.

[41] 40 C.F.R. § 302.4 (1993).

[42] *E.g., United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989); *United States v. Arrowhead Ref'g Co.*, 829 F. Supp. 1078, 1090 (D. Minn. 1993); *CPC Int'l, Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 1279 (W.D. Mich. 1991).

to the "arranged for treatment or disposal" requirement, the United States concedes -- as it must -- that it knew or should have known that Hercules's manufacture of Agent Orange for the DOD would inevitably generate hazardous waste. The United States imposed Agent Orange waste disposal standards under the Walsh-Healey Act. These standards were incorporated into the Agent Orange contract terms. Thus, there was an express contractual arrangement between the United States and Hercules for the treatment or disposal of hazardous substances. Accordingly, the first requirement of CERCLA "arranger" liability is satisfied.

The second, "owned-or-possessed," requirement is also satisfied in this case. The relevant statutory language is written in the disjunctive: "owned **or** possessed." *Id.* Consequently, arranger liability does not require both ownership and possession; possession alone is sufficient. Nor is actual physical possession required for arranger liability. Constructive possession is sufficient.

Even in criminal cases, courts have uniformly held that constructive possession is sufficient to constitute "possession:"

> The law recognizes two kinds of possession: actual and constructive possession. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or though another person or persons, is then in constructive possession of it.[43]

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[43] *Sewell v. United States*, 406 F.2d 1289, 1293 n.3 (8th Cir. 1969) (approving this statement of Arkansas law in a narcotics possession case); *accord, e.g., United States v. Wesley*, 990 F.2d 360, 364 (8th Cir. 1993); *United States v. Boykin*, 986 F.2d 270, 274 (8th Cir.), *cert. denied*, 114 S.Ct. 241 (1993); *United States v. Caves*, 890 F.2d 87, 95 (8th Cir. 1989). The same definition of constructive possession has frequently been applied in civil cases. *E.g., In re Lee Road Partners, Ltd.*, 155 B.R. 55, 59 (Bankr. E.D.N.Y. 1993) (bankruptcy code); *First National Bank v. Lamon Livestock Sales Co.*, 417 N.W.2d 443, 447-48

If constructive possession is sufficient to assess criminal liability, then it is sufficient to establish liability under CERCLA. CERCLA's liability provisions must be liberally construed; they should not be more strictly construed than penal statutes.[44]

In this instance, the United States knowingly had the power and the intention at all times relevant here to exercise control over both the raw materials used and the product made at the Jacksonville Plant, either directly or through another person or persons (*e.g.*, Hercules). Moreover, the United States actually exercised its power by controlling Hercules's supply and use of raw materials; by controlling the product, and the specifications thereof, made at the Jacksonville Plant; by controlling the purchaser of those products; and by controlling the price of those products. The United States also had substantial control over Hercules's waste disposal practices under the Walsh-Healey Act standards. At a minimum, therefore, the United States had constructive possession over the Agent Orange hazardous substances at the Jacksonville Plant; and the United States' constructive possession is sufficient to satisfy the second requirement of CERCLA arranger liability.[45]

(Iowa 1987) (Uniform Commercial Code); *Jacobson v. Aetna Casualty & Surety Co.*, 46 N.W.2d 868, 870-72 (Minn. 1951) (insurance contract).

[44] *Cf., e.g., United States v. Khang*, 904 F.2d 1219, 1222 (8th Cir. 1990) ("'The rule that penal laws are to be construed strictly, is perhaps not much older than construction itself'") (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)) with *Aceto*, 872 F.2d at 1380 (courts should liberally construe arranger liability in order to achieve CERCLA's "'overwhelmingly' remedial statutory scheme") (quoting *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 773 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) ("NEPACCO")).

[45] *See United States v. New Castle County*, 727 F. Supp. 854, 873 (D. Del. 1989) (constructive possession is sufficient for CERCLA arranger liability). In *United States v. Allied Corp.*, 1990 U.S. Dist. LEXIS 20061 (N.D. Calif. 1990), the United States was held liable as

The Eighth Circuit has held private parties liable as CERCLA arrangers in circumstances similar to the facts of this case.[46] Congress intended that the United States be treated the same as private parties in regard to the CERCLA liability. *FMC*, 29 F.3d at 840. The *FMC* court adhered to congressional intent when it held the United States liable as a CERCLA arranger on facts similar to this case.[47] By contrast, the Eighth Circuit violated congressional intent by creating a double standard: the United States is not liable under CERCLA in circumstances where a private party unquestionably would be.

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a CERCLA arranger even though it never owned or physically possessed the hazardous substances.

[46] *See Aceto*, 872 F.2d at 1380.

[47] 29 F.3d at 845-46 (affirming district court decision by evenly divided court *en banc*).

CONCLUSION

The decisions below conflict with a long line of Supreme Court precedents that require federal courts to determine whether they have jurisdiction to review the merits of claims, before they do. Here, both courts proceeded directly to the merits without ever examining the threshold jurisdictional question of sovereign immunity. According to the United States, some twenty-four (24) pending CERCLA cases involve the same or similar CERCLA sovereign immunity issues. If the Eighth Circuit's decision is left undisturbed by this Court, the federal courts will be granted a license to rely on flawed precedent and to ignore the jurisdictional question of sovereign immunity. Moreover, this extreme departure from well settled jurisprudence manifestly transcends CERCLA. Absent action by this Court, the Eighth Circuit's opinion will be favorably cited by other federal courts as a basis for deciding any cases on the merits without deciding jurisdiction.

Further, there is conflict among the circuits concerning the appropriate control standards to apply in order to determine liability under CERCLA. The Supreme Court has never reviewed these CERCLA liability standards. There are many pending cases which present the same or similar issues as those presented by this Petition, and the lower courts urgently need guidance on both the waiver of sovereign immunity under CERCLA and the Act's liability standards.

Finally, this Court has already granted certiorari to review Hercules's closely related DPA claims in the Federal Circuit case. Hercules made the Agent Orange which is the subject of that appeal at the same Jacksonville Plant that is at issue here. The DPA issues which the Supreme Court has decided to review are closely related to the issues presented by this Petition for review of the Eighth Circuit's CERCLA liability decision. But a decision in the Federal Circuit case will neither resolve the sovereign immunity issue nor the conflicts among the circuits regarding CERCLA's liability standards. The Supreme Court should, therefore, grant this Petition on all questions presented and issue a writ of certiorari.

Respectfully submitted,

SCOTT E. SLAUGHTER*
SIMON E. DANCE
COFFIELD UNGARETTI & HARRIS
1747 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20006
(202) 872-4310

Counsel for Petitioner,
Vertac Chemical Corporation

**Counsel of Record*

WINSTON BRYANT*
ATTORNEY GENERAL and
CHARLES L. MOULTON
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY
GENERAL
323 Center Street,
Suite 200
Tower Building
Little Rock, Arkansas
72201-2610
(501) 682-2007

Counsel for Petitioner,
Arkansas Department
of Pollution
Control and Ecology

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 94-1946/1956/1960/2006

United States of America*,

Plaintiff-Appellee,

v.

Vertac Chemical Corporation,

Defendant-Appellant.

Hercules, Incorporated;
Uniroyal Chemical, Limited;

Defendants.

Standard Chlorine of Delaware,Inc.,

Third Party-Defendant.

Arkansas Department of Pollution
Control and Ecology,

Plaintiff,

v.

Vertac Chemical Corporation;

Defendant-Appellant.

Hercules, Incorporated,

Defendant.

Appeals from the United States District Court
for the Eastern District of Arkansas

Submitted: November 14, 1994
Filed: January 31, 1995

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*Title per counsel. Because of multiple cross-, counter- and third-party issues, caption is 106 pages long. Full caption is on file with the Clerk's Office of the Eighth Circuit Court of Appeals in St. Louis, MO.

Before McMILLIAN, WOLLMAN and HANSEN, Circuit Judges.

McMILLIAN, Circuit Judge.

Vertac Chemical Corp. (Vertac), the Arkansas Department of Pollution Control and Ecology (ADPCE), Hercules, Inc. (Hercules), and Uniroyal Chemical, Ltd. (Uniroyal) (collectively appellants), appeal from an interlocutory order entered in the United States District Court[1] for the Eastern District of Arkansas denying their motions for summary judgment and granting a cross-motion for summary judgment brought by the United States of America. *United States v. Vertac Chem. Corp.*, 841 F. Supp. 884 (E.D. Ark. 1993) (*Vertac*). For reversal, appellants argue that the district court erred in holding that the undisputed facts establish as a matter of law that the United States cannot be held liable as either an operator or an arranger within the meaning of § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a). Hercules additionally argues that the district court erred in holding that it is not entitled to immunity under § 707 of the Defense Production Act of 1950 (DPA), 50 U.S.C. app. § 2157, or implied indemnity from the United States. For the reasons discussed below, we affirm the order of the district court.

Background

This case began as a cost recovery action brought by the United States under CERCLA against numerous potentially responsible persons associated with a former herbicide manufacturing facility located in Jacksonville, Arkansas (the Jacksonville facility). The present appeal arises from motions for summary judgment filed by Vertac, ADPCE, and Hercules, and

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1 The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

a cross-motion for summary judgment filed by the United States. By memorandum opinion and order dated October 12, 1993, the district court granted the United States' motion and denied the motions brought by Vertac, ADPCE, and Hercules. *Vertac*, 841 F. Supp. 884. This appeal followed.[2]

Undisputed Facts

The following summary of facts is largely taken from the district court's statement of undisputed facts.[3] *See id.* at 886-88. During the late 1950s, Reasor-Hill Corp. owned and operated the Jacksonville facility, where it manufactured, among other things, chemical herbicides known as 2,4-D[4] and 2,4,5-T.[5] In December of 1961, Hercules purchased the Jacksonville facility from Reasor-Hill. In 1964, in response to contract solicitation proposals published by the United States, Hercules submitted and won competitive bids to supply the United States with an herbicide known as Agent Orange, to be used as a defoliant in Vietnam. Hercules began producing Agent Orange, a mixture

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2 The United States asserts that this court lacks jurisdiction to consider Uniroyal's arguments on appeal because Uniroyal failed either to join in the other appellants' motions for summary judgment or to oppose the United States' cross-motion for summary judgment. We note, however, that Uniroyal did "adopt by reference pursuant to Rule 10(c) of the Federal Rules of Civil Procedure the responses of the State [of Arkansas], Vertac and Dow to the Motion for Summary Judgment of the United States." *See* Appellee's Supplementary Appendix at 139. That adoption is sufficient to confer appellate jurisdiction, and we have considered Uniroyal's arguments to the extent they are within the proper scope of issues on appeal.

3 Appellants do not argue that the district court erred in stating the undisputed material facts. Rather, they maintain that the district court erred in applying the law.

4 2,4-D is 2,4-dichlorophenoxyacetic acid.

5 2,4,5-T is 2,4,5-trichlorophenoxyacetic acid. The manufacture of 2,4,5-T creates a by-product known as TCDD or dioxin.

of the butyl esters of 2,4-D and 2,4,5-T, at the Jacksonville facility.

From 1964 through 1968, Hercules produced and supplied Agent Orange to the Department of Defense (DOD) under rated contracts or orders and directives issued pursuant to the DPA, 50 U.S.C. app. § 2061 *et seq.* The DPA provides, among other things, that the President has authority to designate a contract or order as a "rated order" which shall take priority over the performance of any other contract or order, on grounds that it is deemed necessary or appropriate to promote the national defense. Rated orders may also require the suppliers of a government contractor to give the government contractor similar priority. A "directive" is an official action taken by the Department of Commerce (DOC) under its regulations. It requires a person to take an action or to refrain from taking an action and may take precedence over a rated or unrated contract, to the extent stated in the directive. The rated orders and directives issued to Hercules were subject to rules promulgated by the Business and Defense Services Administration, a unit of DOC.

The rated contracts contained standardized government contract terms and conditions. The contract specifications, which governed matters such as physical properties of the product, packaging, labeling, and quality control, were mainly developed by the United States Army. Hercules and other manufacturers were allowed some input regarding the contract specifications. While DOD allowed Hercules limited opportunities to negotiate and modify the terms of the contract specifications, the specifications remained substantially dictated by DOD.

The rated contracts also subjected Hercules to the terms of the Walsh-Healey Act, 41 U.S.C. § 35. Under the Walsh-Healey Act, Hercules was required to meet certain health and safety standards. Regulations under the Walsh-Healey Act gave the Department of Labor authority to conduct random inspections

at the Jacksonville facility, which it did on two occasions during the period Hercules was producing Agent Orange.

In 1967, the United states issued a directive ordering Hercules to accelerate its production and delivery of Agent Orange. As a result, Hercules devoted all of its efforts at the Jacksonville facility to producing Agent Orange. When Hercules was still unable to meet the United States' production demands, it contracted for the foreign importation of 2,4,5-T and 2,4-D. The government facilitated this importation by waiving import duties, pursuant to 10 U.S.C. § 2383, which provided for duty-free treatment of emergency war materials purchased abroad.

None of the raw materials used by Hercules for the production of Agent Orange was ever owned or directly supplied by the United States. The United States did, however, issue directives to Hooker Chemical (Hooker), to ensure Hooker's supply of tetrachlorobenzene (TCB) to Hercules and other producers of Agent Orange. The United States also did not hold any financial ownership interest in the land, buildings, tools, machinery, or equipment used by Hercules during the time Hercules was producing Agent Orange. In fact, Hercules protected certain aspects of its Agent Orange production process as proprietary information. No representative of the United States ever hired, fired, disciplined, managed, or trained any Hercules personnel who worked on the production of Agent Orange.

The United States knew or should have known that the production of Agent Orange produced wastes. Some of the wastes generated by the production of 2,4,5-T contained hazardous substances, including dioxin. The rated contracts between Hercules and the United States did not address the manner in which Hercules was to handle wastes generated by the production of Agent Orange. Hercules chose to bury wastes generated by the production of 2,4,5-T on-site, which had been its practice before it began producing Agent Orange for the United States. Hercules chose to bury the wastes without consulting

representatives of DOD or DOC. The United States did not take part in designing, performing, or supervising activities related to the handling, treatment, or disposal of wastes while Hercules owned and operated the Jacksonville facility.

Hercules profited from its sales of Agent Orange to the United States under the rated contracts. After Hercules stopped supplying Agent Orange to the United States, it continued to produce and sell to commercial customers other products manufactured with the use of 2,4-D and 2,4,5-T.

Discussion

We review a grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see. e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695, 699 (8th Cir. 1992). Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990). In the present case, the district court held as a matter of law that, under the undisputed facts of the case, the United States cannot be held liable as either an operator or an arranger under 42 U.S.C. § 9607(a)(2) and § 9607(a)(3). *Vertac*, 841 F. Supp. at 890. The district court also held as a matter of law that Hercules is not entitled to immunity under the DPA or implied indemnity from the United States. *Id.* at 891. We agree.

Operator Liability

Under CERCLA, there are four classes of responsible persons who may be held liable for response costs incurred by the United States or another person. 42 U.S.C. § 9607(a). One class includes persons who operated a facility at the time hazardous substances were disposed of at the facility. *Id.* § 9607(a)(2) (owners and operators of facility at time of disposal). This court recently addressed the legal standards for determining an individual's operator liability under § 9607(a)(2) in *United States v. Gurley*, No. 93-2699 (8th Cir. Dec. 28, 1994) (*Gurley*). We determined under the facts of that case that an individual's actual exercise of control over the waste disposal activities conducted at a dump site resulted in personal liability under CERCLA. *Id.*, slip op. at 5-11.

In the present case, we consider the legal standards for determining the government's operator liability under § 9607(a)(2), which we view as similar to corporate liability. As noted in *Gurley*, slip op. at 5-7, the statute itself does not provide much guidance; it simply imposes liability upon "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). The Third Circuit, however, recently addressed this precise issue and held that the United States was an operator under CERCLA in a case involving similar, but not identical, facts to those of the present case. *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) (en banc) (*FMC*).[6] Upon review, we agree with the Third Circuit's conclusion that operator liability may result from actual or substantial control exercised by one entity over the activities of another. *Id.* at 843-45. Determining whether an entity has exerted such actual or substantial control

6 *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) (en banc) (*FMC*), had not been decided at the time the district court rendered its decision in the present case.

requires a fact-intensive inquiry and consideration of the totality of circumstances. *Id.* at 845. In the present case, we hold that the United States cannot be held liable as an operator under CERCLA because it did not exercise actual or substantial control over the operations at the Jacksonville facility.

In *FMC*, the Environmental Protection Agency brought a CERCLA action against potentially responsible persons seeking response costs for cleaning up hazardous substances at a facility in Front Royal, Virginia (the Front Royal facility). The owner of the site, FMC corporation (FMC), sought contribution from the United States pursuant to 42 U.S.C. § 9613(f). FMC alleged that the United States was liable as an owner, operator, and arranger under 42 U.S.C. §§ 9607(a)(2) and § 9607(a)(3) because the War Production Board (WPB)[7] exercised control over the manufacture of high tenacity rayon at the Front Royal facility during the 1940s. Following a bench trial, the district court held that the United States was liable as an owner, operator, and arranger. On appeal, the Third Circuit affirmed, discussing only the United States' liability as an operator.[8] 29 F.3d at 843-45. The Third Circuit applied an "actual control" test for operator liability as set forth in its decision in *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993) (corporate liability). *FMC*, 29 F.3d at 843.

Under the "actual control" test, the Third Circuit considered whether the United States had exercised "substantial control" over the production of high tenacity rayon at the Front Royal site. That standard in turn required, at a minimum, "active involvement in the activities" at the Front Royal facility. *Id.* Based upon the specific facts of the case, the Third Circuit

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7 The War Production Board was later subsumed within the Department of Commerce.

8 By an evenly divided vote, the Third Circuit also affirmed, without discussion, the district court's holding that the United States was liable as an arranger under § 9607(a)(3). *FMC*, 29 F.3d at 845-46.

concluded that the United States had exercised actual control over the activities at the Front Royal facility during the relevant time frame. The Third Circuit reasoned as follows:

> In our view, it is clear that the government had "substantial control" over the facility and had "active involvement in the activities" there. The government determined what product the facility would manufacture, controlled the supply and price of the facility's raw materials, in part by building or causing plants to be built near the facility for their production, supplied equipment for use in the manufacturing process, acted to ensure that the facility retained an adequate labor force, participated in the management and supervision of the labor force, had the authority to remove workers who were incompetent or guilty of misconduct, controlled the price of the facility's product, and controlled who could purchase the product. While the government challenges some of the district court's findings, it simply cannot quarrel reasonably with the court's conclusions regarding the basic situation at the facility. In particular, the government reasonably cannot quarrel with the conclusion that the leading indicia of control were present, as the government determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold.

Id.

A key fact in *FMC* was that American Viscose, the owner of the Front Royal facility at the time high tenacity rayon was manufactured, had been ordered by the WPB to convert its facility to production of high tenacity rayon, rather than the regular textile rayon it had been producing. *Id.* at 836. In other words, American Viscose itself did not choose its product; "the government determined what product the facility would pro-

duce." *Id.* at 843. Thus, the United States was directly and entirely responsible for introducing a new manufacturing process at the Front Royal facility. That manufacturing process generated hazardous substances that were disposed of on-site. Moreover, the United States implemented the required plant conversion by leasing government-owned equipment and machinery and contracting with a third party to install the equipment at the Front Royal plant. *Id.* at 837. By contrast, in the present case, Hercules elected to bid for the Agent Orange government contracts. To the extent Hercules had to change its operations to produce Agent Orange, as opposed to other herbicides using 2,4-D and 2,4,5-T, those changes resulted from its own decision to seek the government's wartime business. *Vertac*, 841 F. Supp. at 886, 890.

Another important fact in *FMC* was that the United states "exerted considerable day-to-day control over American Viscose" during the relevant time period. *FMC*, 29 F.3d at 844. For example, the United States participated in managing and supervising workers, and even appointed a full-time representative to reside at Front Royal to address problems at the facility concerning manpower, housing, community services, and other related matters. *Id.* at 837. By contrast, in the present case, no representative of the United States ever managed or supervised any Hercules personnel during the relevant time period. *Vertac*, 841 F. Supp. at 888. Upon review, we hold that it cannot genuinely be disputed that the United States was never actively involved on a regular basis in, and thus never exerted substantial control over, operations at the Jacksonville facility while Hercules was producing Agent Orange. Moreover, the facts that Hercules was required to comply with the worker health and safety regulations under the Walsh-Healey Act, and that on two occasions inspectors visited the Jacksonville plant to investigate such compliance, are insufficient bases for imposing CERCLA liability on the United States as an operator of the facility. *See, e.g., United States v. Dart Indus., Inc.*, 847 F.2d

144 (4th Cir. 1988) (state environmental agency not an owner or operator of waste site under CERCLA despite allegations that agency issued permits for waste storage, performed inspections, and failed to effectuate a cleanup); *United States v. New Castle County*, 727 F. Supp. 854, 867-70 (D. Del. 1989) (state's regulation of hazardous waste site insufficient to establish operator liability where state did not have a financial or proprietary interest in the site and did not actively participate in daily management and operations of the site).

In sum, the United States was not sufficiently involved, directly or indirectly, in the activities that took place at the Jacksonville facility to constitute actual or substantial control. Accordingly, we hold that, under the facts of the present case, the United States cannot be held liable as an operator of a facility under § 9607 (a)(2).

Arranger Liability

CERCLA also imposes liability for response costs on "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances." 42 U.S.C. § 9607(a)(3). This court addressed the legal standards for finding arranger liability under CERCLA in *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) (*NEPACCO*), *cert. denied*, 484 U.S. 848 (1987), and *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (*Aceto*). Appellants argue that the United States is an arranger under *NEPACCO* and *Aceto* because it had authority to control, and did control, many aspects of the production of Agent Orange. Upon review, we agree with the district court's analysis of this issue.

Liability under § 9607(a)(3) requires, among other things, that the hazardous substances be "owned or possessed by" the

person who arranged for the disposal. In *NEPACCO*, we explained that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme. . . . We believe requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), would be inconsistent with the broad remedial purposes of CERCLA." 810 F.2d at 743. *NEPACCO* involved a question of whether or not a corporate employee could be found to have "owned or possessed" hazardous substances within the meaning of § 9607 (a)(3) by virtue of his specific responsibilities within the corporation, his knowledge of the hazardous nature of substances with which he was dealing, and the specific actions he took. In the present case, we must consider whether or not the United States "owned or possessed" hazardous substances within the meaning of § 9607(a)(3) by virtue of its statutory authority under the DPA and the Walsh-Healey Act, its presumed knowledge that the production of Agent Orange was generating hazardous wastes, and the specific actions it took to facilitate Hercules' production of Agent Orange. Appellants maintain that the United States constructively possessed the hazardous substances disposed of at the Jacksonville facility because the United States had the authority to control, and did control, the product made at the facility and the raw materials necessary to make that product. We disagree.

To begin, we note that a governmental entity may not be found to have owned or possessed hazardous substances under § 9607(a)(3) merely because it had statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances. Our holding in *NEPACCO*, when read in the context of the facts of the case, certainly does not suggest such a broad interpretation. In *NEPACCO*, we concluded that a corporate employee constructively possessed the hazardous substances at issue because he, "actually knew about, had immediate supervision over, and was

directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances." 810 F.2d at 743. In the present case, by contrast, the United States did not immediately supervise, or have direct responsibility for, the transportation or disposal of any hazardous substances generated at the Jacksonville facility. *Vertac*, 841 F. Supp. at 887-88.

Appellants maintain, however, that they are not merely relying on the United States' regulatory powers as a basis for asserting arranger liability under *NEPACCO*. They contend that it is the additional contractual relationship between Hercules and the United States, as governed by the DPA, that gives rise to the latter's liability as an arranger. We again disagree. As stated by the district court, "there is no dispute that Hercules actively sought Agent Orange contracts by participating in competitive bidding and that it made a profit from each contract." *Vertac*, 841 F. Supp. at 890. Moreover, "the relationship between the United States and the contractor under the DPA is one of buyer and seller, except that the buyer (i.e., the United States) has the power to require the seller to perform the contract and to give it priority over other contracts." *Id.* Finally, Hercules was given opportunities to negotiate some terms of the contract specifications and, as a result, some of those terms were changed or modified. *Id.* at 886. Thus, while *NEPACCO* certainly suggests that circumstances may exist where a government contract involves sufficient coercion or governmental regulation and intervention to justify the United States' liability as an arranger under CERCLA,[9] the undisputed facts in the present case do not support such a finding.

Appellants rely, in the alternative, on this court's decision in *Aceto*. In *Aceto*, the appellants, pesticide manufacturers,

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9 *Cf. FMC*, 29 F.3d at 845-46 (affirming without discussion the district court's ruling that the government was liable as an arranger under CERCLA).

argued that they could not be liable as arrangers of hazardous waste disposal where the wastes were generated by an independent contractor whom they had hired to formulate technical grade pesticides into commercial grade pesticides. The complaint alleged that the appellants owned the technical grade pesticides used in the formulation, the work in process, and the resulting commercial grade product. 872 F.2d at 1378. On appeal, this court affirmed the district court's denial of the appellants' motion to dismiss, noting that the appellants actually owned the hazardous substances, as well as the work in process. *Id.* at 1381-82. In other words, the complaint alleged that, throughout the production process, the appellants retained actual ownership of the hazardous substances in question. Therefore, a claim of arranger liability had been sufficiently alleged, even though the appellants were never actually involved in the treatment or disposal of the hazardous wastes. *Id.* at 1382.

Appellants in the present case argue that *Aceto* applies because the United States (1) supplied the raw materials to Hercules for the production of Agent Orange by issuing directives to Hooker requiring Hooker to supply TCB to Hercules, giving Hercules authority to enter rated contracts with its suppliers, and waiving import duties for some of Hercules' foreign suppliers, and (2) constructively possessed the hazardous substances and the work in process by having the authority to control the supply of TCB, Hercules' production process, and the end product.

We agree with the district court's determination under *Aceto* that the United States did not supply the raw materials to Hercules and did not own or possess the raw materials or the work in process. *See Vertac*, 841 F. Supp. at 888-89. Although the United States took steps to facilitate Hercules' acquisition of TCB, the United States was never actively involved in supplying Hercules with any such raw materials. Nor did the United States own or have any financial interest in any of

Hercules' suppliers. *Cf. FMC*, 29 F.3d at 837 (government built and retained ownership of sulfuric acid plant adjacent to facility to assure adequate supply of sulfuric acid). The facts simply do not support the conclusion that the United States actually or constructively supplied Hercules with its raw materials. It also cannot reasonably be inferred that the United States constructively owned or possessed the raw materials or the work in process that generated hazardous wastes at the Jacksonville facility. As previously discussed, the undisputed facts establish that the United States' actual involvement in the operations of the Jacksonville facility was sporadic and minimal.

Accordingly, we hold that, under the facts of the present case, the United States cannot be held liable under CERCLA as an arranger of hazardous waste disposal under § 9607(a)(3).[10]

Hercules' immunity and indemnity arguments

Hercules additionally argues on appeal that it is immune from CERCLA liability arising out of its performance of the Agent Orange contracts and that the United States has an implied duty to indemnify Hercules. The district court rejected these arguments in its summary judgment order without discussing its reasons. *Vertac*, 841 F. Supp. at 891. Upon careful review of the undisputed facts and the arguments presented on appeal, we affirm the district court's decision.

Hercules bases its immunity argument on § 707 of the DPA, 50 U.S.C. app. § 2157, which provides:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act [sections 2061 to 2071 of this Appendix], notwithstanding that any

10 Our conclusions that the United States is neither an operator nor an arranger under CERCLA obviates the need to address the United States' sovereign immunity arguments.

> such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this Act [sections 2071 to 2076 of this Appendix] or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.

Hercules argues that the language of § 707 is clear and unambiguous and that nothing in its language supports an interpretation that would exclude Hercules' CERCLA liability, or any other liability, arising out of its performance of the Agent Orange contracts. In response, the United States argues that the language of § 707 is not clear and unambiguous and that the interpretation advanced by Hercules would have the absurd result of allowing a government contractor to violate the laws with impunity, so long as it is performing a rated contract.

In *Hercules, Inc. v. United States*, 24 F.3d 188, 203-04 (Fed. Cir. 1994) (*Hercules*), the Federal Circuit was similarly required to examine the scope of the immunity provided by § 707. The Federal Circuit considered the relationship between § 707 and § 101(a) of the DPA, 50 U.S.C. app. § 2071(a), which authorizes the President to designate certain government contracts for priority over other contracts when necessary or appropriate to promote the national defense. Noting, as a general rule, that statutory provisions enacted together must be read harmoniously, the Federal Circuit reasoned "[t]o hold that section 707 protects contractors against a risk which is greater than that created by the statute with which it operates would violate this rule." 24 F.3d at 204. Accordingly, the Federal Circuit concluded "the protection afforded by section 707 of the DPA

extends no further than the risk imposed by section 101(a) of the DPA." *Id.* We agree. Accordingly, we hold in the present case that § 707 does not shield Hercules from liability it may have under CERCLA arising out of its performance of the Agent Orange contracts because such immunity would exceed the risk imposed by § 101(a).[11] *Accord United States v. General Dynamics Corp.*, 1988 U.S. Dist. LEXIS 17256 (N.D. Tex. June 9, 1988) (§ 707 immunity does not apply to liability under the Clean Air Act).

Hercules separately argues that it is entitled to indemnity from the United States arising out of Hercules' immunity under § 707, the United States' waiver of immunity, and the United States' liability under CERCLA. Because Hercules is not entitled to immunity under § 707, its implied indemnity argument must also fail. In light of our interpretation of § 707, it cannot genuinely be disputed that the United States never implicitly promised to indemnify Hercules for the type of liability at issue in the present case. *See Hercules*, 24 F.3d at 204 (government's use of DPA to issue rated orders for production of Agent Orange did not create an implied-in-fact contractual obligation that government must indemnify contractor for tort liability to third parties).

Accordingly, we hold that Hercules is not entitled to immunity under § 707 of the DPA or implied indemnity from the United States.

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11 "We agree that § 707 "provid[es] a defense for a DPA contractor against a suit by a non-government customer in the event that the DPA contractor is forced to breach another contract to fulfill the government's requirements." *Hercules, Inc. v. United States*, 24 F.3d 188, 203 (Fed. Cir. 1994). However, we do not comment on the extent to which § 707 might provide immunity under other circumstances not presented in this case.

For the foregoing reasons, the order of the district court is affirmed.

A true copy.

Attest:

CLERK,
U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-80-109

UNITED STATES OF AMERICA

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

Civil No. LR-C-80-110

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

Plaintiff

VERTAC CHEMICAL CORP., ET AL.

Defendants

ORDER

As set forth in previous order, this case is set for trial beginning November 1, 1993. A number of parties have requested a jury trial. Other parties have objected, arguing that the parties are not entitled to a jury trial on the issues pending. The Court has reviewed the submissions and will grant the request for a jury trial. A twelve-person jury will be empaneled, and will decide those issues which are properly to be decided by the jury and will act as an advisory jury with respect to the other issues. F.R.Civ.P. 39(c).[1]

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1 The Court need not decide now which issues should be resolved by the jury.

The Court has also reviewed the various trial plans submitted by the parties and will adopt the plan offered by the United States, et al.[2] The Court is persuaded that this plan is best suited to deal with the multiple claims and parties to this action. Thus, the trial will begin with any claims the United States has against Hercules.[3]

The Court has reviewed the motions for summary judgment regarding the liability of the United States under CERCLA. The Court finds that the United States is not liable under Sections 107(a)(2) or 107(a)(3) with regard to the production of Agent Orange. Thus, the motions for partial summary judgment of Vertac, ADPC&E and Hercules against the United States are denied. The motion of the United States against Vertac, Arkansas, Hercules, Dow, Uniroyal, Velsicol and BASF is granted. A more detailed memorandum opinion setting forth the Court's reasoning will be forthcoming.

Several parties have inquired as to the necessity of Local Rule 21 pretrial conference information sheets. The parties are directed to file a modified pretrial conference information sheet which contains a summary of the claims of the parties and a *brief* description of the facts and law that forms the basis for the claims. The information sheet shall be filed by October 20, 1993.

Accordingly, Vertac's and ADPC&E's motion for partial judgment against the United States on CERCLA liability (document number 1170) is denied; Hercules' motion for partial

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2 The Court recognizes that the United States opposes a request for a jury trial. Thus, the United States' proposal is modified to the extent the Court has determined that the case will be tried before a jury, sitting either as the fact finder or in an advisory capacity.

3 The Court will be issuing a ruling on the United States' motion for partial summary judgment against Hercules regarding CERCLA liability before the pretrial conference.

summary judgment as to the claims against the United States (document number 1339) is denied; the United States' motion for summary judgment against Vertac, et al. (document number 1403) is granted; Hercules' and Uniroyal's motions for trial by jury (document numbers 1650 and 1652) is granted; the trial plan proposal submitted by the United States, et al. is adopted.

IT IS SO ORDERED this 7th day of October, 1993.

/s/
George Howard, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-80-109

UNITED STATES OF AMERICA

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

Civil No. LR-C-80-110

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

Plaintiff

VERTAC CHEMICAL CORP., ET AL.

Defendants

MEMORANDUM OPINION AND ORDER

In the present case, the State of Arkansas and Vertac along with Hercules have filed motions for summary judgment asking that the United States be held liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601 *et seq.* for its role in the production of Agent Orange.[1] In response, the United States has filed a motion for partial summary judgment asking that the Court find that it is not liable.

1 The State of Arkansas and Vertac filed a Joint motion for summary judgment against the United States. The State and Vertac will be referred to collectively as Vertac.

Hercules and Vertac argue that the United States is liable as an operator under section 107(a)(2) and an arranger under section 107(a)(3) of CERCLA. They argue that the United States' liability arises from the government's authority under the Walsh-Healey Act, 41 U.S.C.§35 *et seq.* and the Defense Production Act of 1950 ("DPA"), 50 U.S.C. app. §2061 *et seq.* during the time the United States purchased Agent Orange from Hercules for use in the Vietnam war.[2] The facts are basically not in dispute, and the relevant ones are set forth below.

SUMMARY OF UNDISPUTED FACTS

Hercules purchased the assets of Reasor-Hill corporation in December, 1961. Reasor-Hill began producing 2,4-D esters and amines in 1955, and 2,4-5-T in 1957. During the period December 1961 through the fall of 1971, Hercules owned and operated the herbicide production facility at Marshall Road in Jacksonville, Arkansas (the "Jacksonville facility.") Shortly after taking over the Jacksonville plant in 1961 and prior to entering into the rated contracts for the supply of Agent Orange, Hercules began burying wastes generated from Reasor-Hill's operations.

From 1964 through 1968, Hercules produced Agent Orange for the United States at the Jacksonville facility. Agent Orange is a mixture of the butyl esters of 2,4,5-trichlorophenoxy acetic acid ("2,4,5-T")and 2,4-dichlorophenoxyacetic acid ("2,4-D"). Hercules produced Agent Orange for the United

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2 The United States used various herbicides for defoliation and crop destruction spraying in Vietnam beginning in 1962. After 1964, Agent Orange, a 50-50 mixture of the n-butyl esters of 2,4-D and 2,4,5-T was one of the most widely used herbicides. "As the war in Vietnam escalated in the mid-1960s, so too the use of herbicides expanded. In 1967, the peak year for herbicide spraying in South Vietnam, 1,687,758 acres were sprayed—85% for defoliation purposes and 15% for crop destruction." *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 777 (E.D.N.Y. 1984)

States pursuant to rated contracts and directives issued under the DPA.

The DPA authorizes the President to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over the performance under any other contract or order, and further authorizes the President to require the acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds capable of performing the contracts. The DPA allows for a penalty to be levied against a private manufacturer in an amount of up to $10,000.00 and imprisonment of up to one year for willful failures to perform any act required by the DPA or any regulation or order under the DPA. 50 U.S.C. §2073.

"Rated orders" are contracts or purchase orders that have a priority rating. There are two levels of priority ratings. The "DX" rating is the higher level of priority rating. The "DO" rating is the lower level of priority rating. Where there is a conflict between the performance of a rated order and an unrated order, the rated order takes precedent.

"Directives" are official actions taken by the Department of Commerce ("DOC") under its regulations. A directive requires a person to take an action or to refrain from taking an action. A directive takes precedence over both rated orders and unrated orders to the extent that such preference is stated in the directive.

Hercules submitted competitive bids, including sales prices, in response to the contract solicitation proposals published by the United States pertaining to Agent Orange. Hercules supplied Agent Orange to the Department of Defense ("DOD") pursuant to rated contracts and directive issued under the DPA. These rated contracts and directives were subject to rules promulgated by the Business and Defense Services Administration ("BDSA"), a primary organizational unit of DOC.

The rated contracts between DOD and Hercules contained standardized government contract terms and conditions set forth in standardized "DO Forms." DOD provided opportunities to Hercules to negotiate at least some of the terms of the contract specifications pertaining to Agent Orange. As a result of these negotiations, DOD changed or modified the terms of various contract specifications.

Hercules made a profit for performing each rated contract for the supply of Agent Orange. Under the Agent Orange contracts, from June of 1964 to May of 1968, Hercules shipped over 2.7 million gallons of Agent Orange to the United States for use in the Vietnam War.

The specifications for Agent Orange were developed by the United States Army. At times, the government received input concerning some specifications from the other services and manufacturers of Agent Orange, including Hercules. Some of these specifications included information regarding physical properties, packing, and quality control instructions. Under several of the contracts for the supply of Agent Orange, Hercules was required to produce Agent Orange under other military specifications.

In March, 1967, the BDSA issued a directive under the DPA to Hercules requiring Hercules to accelerate the delivery of Agent Orange to the United States to a monthly rate of 65,000 gallons beginning April 3, 1967. This monthly rate constituted all of the Jacksonville facility's production capacity.

The directive told Hercules that the tetrachlorobenzene ("TCB") it needed to produce Agent Orange for the United States could be obtained by placing DO rated orders on Hercules' TCB suppliers, including Hooker Chemical. In connection with the March, 1967 directive, the BDSA told Hercules to inform the BDSA immediately if Hercules had any difficulty obtaining the raw material it needed to produce the Agent Orange.

Hercules was unable to meet the production demands placed upon it by the Directive and at the same time maintain its share of the commercial 2,4-D market. Hercules contracted for the import or 2,4,5-T and 2,4-D in order to comply with its contracts with the government. The government facilitated these imports of 2,4,5-T and 2,4-D by waiving, pursuant to 10 U.S.C. §2383 (providing for duty-free treatment of emergency war materials purchased abroad), all import duties usually charged on the shipment of goods from abroad. These imports could be utilized on the Agent Orange contracts (but only on those contracts), thereby freeing up some 2,4-D production.

The United States did not directly supply Hercules with TCB or any other raw material. The United States did not own or physically possess any TCB or any other raw material which Hercules obtained, by the placement of rated orders, from Hooker Chemical Corporation or any other supplier.

The United States, beginning in 1967, issued directives to Hooker requiring Hooker to supply the necessary raw materials for the production of Agent Orange to the suppliers, including Hercules.

The United States held no financial ownership interest in the land, buildings, tools, machinery or equipment used by Hercules during the period of time in which Hercules produced Agent Orange. Hercules considered parts of its process, including the toluene extraction process, for the production of Agent Orange as proprietary information.

The active ingredients for 2,4,5-T and 2,4-D sold to the Department of Defense ("DOD")were the same as those contained in some commercial 2,4,5-T and 2,4-D products. However, the 2,4,5-T and 2,4-D products sold commercially by Hercules were sold in a diluted form. The product sold to the government was sold in an undiluted form.

After termination of the contracts with DOD for the supply of Agent Orange, Hercules manufactured and sold various formulations of esters and salts of 2,4,5-T and 2,4-D to commercial customers.

The United States admits that the production of Agent Orange generates wastes and that it knew or should have known that. The parties also agree that many of the wastes generated by Hercules from the production of 2,4,5-T sold to DOD and to commercial customers contained "hazardous substances" within the meaning of CERCLA. Hercules buried wastes generated from the production of 2,4,5-T sold to DOD and to commercial customers at the Jacksonville facility. These wastes are still located at the facility.

There is no dispute that the contracts did not require Hercules to bury the wastes or to handle them in any particular manner. Hercules made the decision to bury the wastes at the Jacksonville facility, without consulting with DOD or DOC personnel. Furthermore, the DOD or DOC took no part in designing, performing, or supervising activities relating to the handling, treatment or disposal of wastes during the time Hercules owned and operated the Jacksonville facility.

In addition, during the time Hercules owned and operated the Jacksonville facility, the United States did not hire, fire, discipline, manage or train any Hercules personnel who worked in the Agent Orange production process.

"OPERATOR" AND "ARRANGER" LIABILITY UNDER CERCLA

Vertac and Hercules assert that the United States is liable as an operator under section 107(a)(2) of CERCLA. That section imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated the facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). Similarly, Vertac and Hercules assert

that the United States is liable as an arranger under section 107(a)(3) of CERCLA, which imposes liability on any person who arranged for disposal of hazardous substances owned or possessed by the person at any facility from which releases have occurred. Their argument relies on the "authority to control" they claim the United States had with regard to the disposal of the wastes under the DPA and Walsh-Healey Act.

Under Section 107(a)(2), a non-owner of the property is liable as an operator if the person either (1) actually participated in the operations of the facility; or (2) actually exercised control over, or was otherwise intimately involved in the operations of the corporation immediately responsible for the operation of the facility. *Levins Metals v. Parr-Richmond Terminal*, 781 F. Supp. 1454, 1456 (N.D. Cal. 1991).

Two alternative bases exist for arranger liability in this context. In *United States v. Northeastern Pharmaceutical & Chemical Co.* ("*NEPACCO*"), 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 948 (1987), the court imposed arranger liability on persons who actually controlled or had authority over the disposal of hazardous substances even though they did not own or physically possess them. Thus, arranger liability could be imposed where the defendant had actual authority to control the disposal of hazardous substances.

In the absence of actual involvement in the disposal of the hazardous substances, arranger liability has been found where the defendant retained ownership or control or the hazardous substances throughout the production process that generated the hazardous waste. In *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), the court denied a motion to dismiss where the defendants—pesticide manufacturers—had owned and possessed the hazardous substances prior to arranging for disposal. The manufacturers contracted with Aidex Corporation—a formulator of chemicals to blend and package their pesticides. It was during Aidex's handling of the

raw materials owned by the manufacturers that there were spills of the materials at the Aidex.

The Eighth Circuit held that arranger liability could be inferred where (1) the person owned the hazardous substances or supplied them to another person who processed them and, thereafter, disposed of at least some of the hazardous substances; and (2) the person owned or controlled the hazardous substances during the work in process; and (3) the generation and disposal of hazardous substances were inherent in the production process.[3] *See Jones-Hamilton v. Beazer Materials & Services*, 959 F.2d 126, 131 (9th Cir. 1992) (arranger liability could be found where defendant retained ownership of the materials it provided, the materials provided included hazardous substances, and the contract contemplated a small amount of spillage of the hazardous materials).

Thus, to impose arranger liability on the United States arising from its purchase of Agent Orange, Vertac and Hercules must prove either (1) under *NEPACCO*, that the United States had the actual authority over the disposal of hazardous substances at the Hercules plant, or (2) under *Aceto* that the United States supplied the raw materials, and owned or controlled the

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3 Dow, in its response to the cross motions for partial summary judgment, argues that the United States has eliminated a third element in its analysis of *Aceto*. That is, the United States construes *Aceto* as requiring ownership of raw materials, the work in process, and the final products, without any authority, involvement, or direction over the process resulting in the disposal of hazardous substances, to be sufficient to confer arranger liability. Dow contends that arranger liability under *Aceto* requires a finding that defendants directed and controlled the process under which the hazardous substances were generated.

The Court need not decide, at this time, whether the narrower standard urged by Dow should be applied in this instance. The uncontested facts reveal that the United States neither owned nor controlled the work in process, and therefore, it is not liable even under the broader standard sought by the United States.

work in process, and that the generation of hazardous substances was inherent in the production process.

The undisputed facts in the case reveal that the United States cannot be held liable as either an operator or an arranger. There is no evidence that the United States actually participated in the actual management or daily operations of the facility. The United States neither supplied the raw materials used to make Agent Orange nor did it own or possess the raw materials. It did not dictate the manner in which the wastes were to be disposed or nor did it in any way control the disposal of those wastes.

There is no dispute that Hercules' contracts with the United States subjected it to the terms of the Walsh-Healey Act. The Act provides for government regulation of worker safety and health practices. It provides that no part of a government contract subject to the Walsh-Healey Act will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under the contract be manufactured or fabricated in any plants or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of the employees performing the contract.

Walsh-Healey inspectors visited the plant for the limited purpose of investigating occupational safety and health hazards that could potentially harm Hercules employees. The inspectors did not assume any management or control over Hercules waste disposal activities.

The Walsh-Healey Act did not give the Department of Labor ("DOL") inspectors any authority over Hercules' disposal of hazardous waste. The DOL had the authority only to issue citations for worker health and safety violations. Indeed, the DOL issued two Notices of Violation to Hercules. In October of 1968, a DOL safety engineer found a number of safety violations upon the inspection of the plant. The DOL issued a "Notice of Violation" outlining the deficiencies. One month later, an industrial hygienist with the DOL conducted a follow-

up inspection. Following his inspection, the DOL served Hercules with another "Notice of Violation." Hercules responded to both notices and took appropriate corrective measures to remedy the problems.

Of import is that DOL had no authority to control the manner in which the contractor remedied the problem. Thus, even assuming that the inspector found problems with Hercules' disposal of wastes, he or she could only issue a citation. The manner in which Hercules dealt with the problem, or how it intended to treat or dispose of its wastes, was left to its discretion.

The Court cannot find, based on the undisputed facts, that the authority of the United States to regulate the working conditions of the employees at the plant under the Walsh-Healey Act gave the United States the authority to control the waste disposal activities required for liability under CERCLA.

Hercules and Vertac argue that the DPA gave the United States pervasive control over virtually all aspects of Hercules' operations and business at the Jacksonville plant. Such an attempt to inject the element of "substantial control" into performance of contracts under the DPA must be rejected.

Section 101 of the DPA gives the President authority to require companies to accept and perform any contracts and orders that the President deems necessary or appropriate to promote the national defense, and to require that companies give priority to the performance of such contracts over the performance of other contracts or orders. 50 U.S.C. app. § 2071. The DPA does not give the United States the authority to take over the plant, or to control the contractor's operations and activities. Rather, the relationship between the United States and the contractor under the DPA is one of buyer and seller, except that the buyer (i.e., the United States) has the power to require the seller to perform the contract and to give it priority over other contracts.

Hercules also argues that it was compelled to perform the Agent Orange contracts under the DPA. A similar argument was rejected in *Ryan v. Dow*, 781 F. Supp. 934, 950 (E.D.N.Y. 1991). There, Agent Orange manufacturers (including Hercules) sought removal to federal court of a tort action brought against them by civilians in Vietnam during the war. While the court recognized that the manufacturers of Agent Orange were compelled to deliver the product to the United States, the court stated, in relevant part:

> They [the manufacturers] are being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants. . . . The government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries.

Furthermore, the Court cannot find under the circumstances that the degree of compulsion asserted by Hercules existed. There is no dispute that Hercules actively sought Agent Orange contracts by participating in competitive bidding and that it made a profit from each contract. There is also no dispute that Hercules sold herbicides similar to Agent Orange both prior to and after the contracts with the government. *See Ryan v. Dow Chemical*, 781 F. Supp. at 950 ("The government bought the chemical components for Agent Orange and other defoliants as existing products privately developed and used them in mixtures which were derived from defendants' standard recipes. Thus, the 'compulsion' under which the defendants operated predominantly concerned marketing rather than design and manufacture.")

Hercules and Vertac make much of the "authority" to control. However, their attempt to impose liability on the

United States based merely on an "opportunity or ability to control" Hercules' waste disposal practices must be rejected. In *General Electric Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281, 286 (2nd Cir. 1992), the court refused to accept a similar argument. The court concluded "that it is the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision." The court further noted that courts holding defendants liable as arrangers have found that the defendant had some actual involvement in the decision to dispose of the waste. "The most commonly adopted yardstick for determining whether a party is an owner-operator under CERCLA is the degree of control that party is able to exert over the activity causing the pollution." *CPC International, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783, 788 (W.D. Mich. 1989) (finding that "mere regulatory activities will not subject a state agency to liability as an owner-operator.")

The Court finds that the United States did not have authority over or involvement with Hercules' operations and decisions concerning the plant and the disposal of wastes. Such authority or involvement cannot be conferred from either the Walsh-Healey Act or the DPA. As such, the Court finds that the United States is not liable as an arranger or operator under CERCLA for its role in the production of Agent Orange.[4]

The Court has reviewed the remaining arguments asserted by Hercules and Vertac and finds that they are without merit. In particular, the Court finds that Hercules is not entitled to immunity under section 707 of the DPA or to indemnity.

Accordingly, the motions for partial summary judgment of Vertac and ADPC&E (document number 1170) and Hercules

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4 The Court finds that questions of fact exist concerning the United States liability as an "owner" for the Arkansas Ordnance plant during the World War II period.

(document number 1339) are denied; the motion for summary judgment against Vertac, et al. (document number 1403) is granted.

IT IS SO ORDERED this 12th day of October, 1993.

/s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-80-109

UNITED STATES OF AMERICA

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

Civil No. LR-C-80-110

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

JUDGMENT

Pursuant to the Order entered this date, final judgment is entered pursuant to Rule 54(b) on the claims against the United States regarding production of Agent Orange, in particular, the Order granting the United States' motion summary judgment and denying the motions for partial summary judgment of Vertac, ADPC&E and Hercules.

IT IS SO ORDERED this 1st day of March, 1994.

/s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-80-109

UNITED STATES OF AMERICA

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

Civil No. LR-C-80-110

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

ORDER

Pending before the Court is the motion of the Arkansas Department of Pollution Control and Ecology ("ADPC&E")and Vertac for entry of a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on the Agent Orange claims against the United States.

On October 12, 1993, the Court granted the United States' summary judgment motion on the Agent Orange CERCLA liability claims. With the settlement between the ADPC&E, Vertac and the United States of the non-Agent Orange claims, all claims brought under CERCLA against the United States will have been resolved.[1]

1 The settlement covers claims not related to the Agent Orange claims, that is, the United States' operation of an Army Ordnance Plant at the Vertac

No one disputes that all claims against the United States have been resolved. Hercules opposes the entry of a Rule 54(b) order. It contends that the request of Vertac and ADPC&E is premature. It asserts that the Court should consider the issue of appellate review at one time; that is, when all issues involving the liability of all parties are resolved.

While Hercules' argument ostensibly appears reasonable, it must be rejected. Appellate review of the liability of various parties may not be automatic. Review will need to be sought under 28 U.S.C. §1292(b). Such review requires certification by the Court, and acceptance by the appellate court. Thus, appellate review of all liability issues at one time will not necessarily be certain or assured.

The Court must determine whether certification of the Agent Orange claims under Rule 54(b) is proper. In so doing, the Court "must first determine that it is dealing with a 'final judgment.' It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980).

Here, the order granting summary judgment on the Agent Orange claims meets the definition of a final judgment with respect to the claims against the United States. It resolves the United States' liability under CERCLA for its role in the production of Agent Orange.

Having found that the order pertaining to the production of Agent Orange suffices as a final judgment, the Court must determine whether there is any just reason for delay. In deciding whether there are no just reasons to delay, the court "must take into account judicial administrative interests as well as the

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Site during World War II; the United States' transactions with Vertac during the early 1970s; and various claims involving the Little Rock Air Force Base.

equities involved." The Court may consider "such factors as whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Id* at 8. *See also In re National Smelting of New Jersey, Inc. Bondholders' Litigation*, 695 F. Supp. 796, 798 (D. N.J. 1988) (*Curtiss-Wright* suggests balancing of relative hardships. First, court must weigh relative prejudice that nonmovant party would experience if certification granted against hardship movant would fact if certification denied. Second, court must determine whether certification would foster the interest of sound judicial administration).

It appears that no hardship would result to the United States or the other parties whose claims are yet to be resolved if certification is granted. As stated above, all claims against the United States as a responsible party under CERCLA have been resolved. The Agent Orange claims are separate and independent of other claims and will not require the appellate court to consider the same legal or factual issues in a subsequent appeal. Furthermore, the appellate court's decision on the Agent Orange claims could not be mooted by subsequent action in the remaining phases of this litigation.

Vertac also argues that it will be prejudiced by a delay in the appeal. While the court is of the opinion that its decision was correct in granting the United States' motion for summary judgment, the Court recognizes that an early appellate review of Vertac's claim would be beneficial.

Accordingly, the motion for entry of final judgment under Rule 54(b) on the Agent Orange claims against the United States is granted. Judgment will be entered accordingly.

IT IS SO ORDERED this 1st day of March, 1994.

/s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

STATUTES AND REGULATIONS

Statutes

1. CERCLA Section 101(20)(A), 42 U.S.C. § 9601(20)(A):

   The term "owner or operator" means . . . (ii) in the case of an onshore facility or a off-shore facility, any person owning or operating such facility . . . .

2. CERCLA Section 101(21), 42 U.S.C. § 9601(21):

   The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

3. CERCLA Section 107(a), 42 U.S.C. § 9607(a):

   Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

   . . .

   (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

   (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances . . . shall be liable for —

   (A) all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .

4. CERCLA Section 120(a)(1), 42 U.S.C § 9620(a)(1):

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

5. Defense Production Act, Section 101(a), 50 U.S.C. app. § 2071(a):

The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

6. Defense Production Act, Section 103, 50 U.S.C. app. § 2073:

Any person who willfully performs any act prohibited, or willfully fails to perform any act required, by the provisions of this title [sections 2071 to 2076 of this Appendix] or any rule, regulation, or order thereunder, shall, upon convic-

tion, be fined not more than $10,000 or imprisoned for not more than one year, or both.

7. Section 35(e) of the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35(e):

> **Contracts for materials, etc., exceeding $10,000; representations and stipulations**
>
> In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:
>
> . . .
>
> (e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

8. Section 36 of the Walsh-Healey Public Contracts Act, 41 U.S.C. § 36:

> **Liability for contract breach; cancellation; completion by Government agency; employee's wages**
>
> Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 35 of this title shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor . . . .

9. Section 37 of the Walsh-Healey Public Contracts Act, 41 U.S.C. § 37:

> **Distribution of list of persons breaching contract; future contracts prohibited**
>
> The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or repre-

sentations required by sections 35 to 45 of this title. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred. (June 30, 1936, c. 881, § 3, 49 Stat. 2037)

10. Section 43a(c) of the Walsh-Healey Public Contracts Act, 41 U.S.C. § 43a(c):

(c) Judicial review

Notwithstanding the inclusion of any stipulations required by any provision of sections 35 to 45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms "locality," "regular dealer," "manufacturer," and "open market."

Regulations

1. The United States Department of Labor's regulations implementing the Walsh-Healey Public Contracts Act:

41 C.F.R. § 50-204.1. Scope and Application

(a) The Walsh-Healey Public Contracts Act (40 Stat. 2036, 41 U.S.C. §§ 35 *et seq.* requires that contracts entered into by any agency of the United States for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000 must contain, among other provisions, a stipulation that "No

part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract." This Part 50-204 of this chapter expresses certain minimum safety and health standards which will be applied in the administration and enforcement of the Act, including proceedings under its section 5 and 41 CFR Part 50-203, Subpart A, to determine whether particular contracts subject to the Act are being, or have been, performed in compliance with its safety and health requirements.

(b) In all administrative, enforcement, and investigative proceedings conducted by the United States Department of Labor under the Act, official notice will be taken of the fact that failure to comply with the requirements expressed in this Part 50-204 of this chapter results in working conditions which are "unsanitary or hazardous to employees" within the meaning of section 1(e) of the Act, and contracts incorporating the stipulation it requires.

(c) In formal enforcement proceedings under section 5 of the Act, respondents will be permitted to demonstrate, by reliable, substantial, and probative evidence, that their failure to comply with the requirements expressed in Part 50-204 of this chapter did not result in working conditions which were "unsanitary or hazardous or

dangerous to employees," but only if the answer to the complaint, filed under 41 CFR 50-203.3, makes express allegation to that effect, identifying the particular code unit challenged and setting out the factual basis for the challenge. In the event such issue is drawn, and reliable, substantial, and probative evidence is introduced in support of the challenge, the pertinent portions of the publications of the American Standards Association, Inc., American Society of Mechanical Engineers, National Fire Protection Association, National Board of Fire Underwriters, the Public Health Service of the United States Department of Health, Education, and Welfare, the Bureau of Mines of the United States Department of the Interior, and the Atomic Energy Commission will be considered, together with any other evidence that may be adduced in support of the regulation, on the issue whether the preponderance of the reliable, substantial, and probative evidence supports a finding that the working conditions prohibited in the regulation are unsanitary or hazardous or dangerous to the health and safety of employees.

(d) The standards expressed in Part 50-204 of this chapter are for application to ordinary employment situations, and do not preclude proof or recognition of the necessity of higher standards for employment situations of extraordinary hazard. Neither do the standards expressed in this Part 50-204 of this chapter purport to describe all of the working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees. Other working conditions may be found to be unsanitary or

hazardous or dangerous to the health and safety of employees on evidence to that effect, or without such evidence, where such unsanitary or hazardous or dangerous characteristic should be apparent to a rational and prudent person of common experience.

(e) Compliance with the standards expressed in Part 50-204 of this chapter will not relieve anyone from any obligation to comply with any more strict standard stemming from any other source whatsoever.

41 C.F.R. § 50-204.233. Receptacles for Waste Disposal.

Any receptacle used for decaying solid or liquid waste or refuse shall be so constructed that it does not leak and may be conveniently and thoroughly cleaned, and it shall be maintained in a sanitary condition. Such a receptacle shall be equipped with a tight-fitting cover.

41 C.F.R. § 50-204.234. Sweeping and Refuse Removal.

All sweepings, solid or liquid waste, refuse, and garbage shall be removed in such a manner as to avoid creating a nuisance or menace to health and as often as necessary to maintain the place of employment in a sanitary condition.

2. The Business and Defense Services Administration's regulations implementing the Defense Production Act: 32A C.F.R., Chapter VI, BDSA Reg. 2, §§ 1, 3, 16, & 27.

Section 1. What This Regulation Does.

This regulation states the basic rules of the priorities system to be administered by the National

Production Authority [NPA]. It states what kind of orders are rated orders, how to place them, and the preference status of such orders. These rules apply to all business transactions within the jurisdiction of NPA unless more specific regulations, orders, or directives of NPA state otherwise.

. . .

Section 3. Ratings Authorized

(a) The following ratings are authorized:

(1) *A DO rating*. This rating will be indicated by the prefix DO and an identification of the program which must be furnished a supplier by the person who is using the rating.

(2) *A DX rating*. This rating will be indicated by the prefix DX and an identification of the program. The DX rating will be authorized for use only as an emergency rating, to obtain products and materials in cases of extreme urgency. Except where expressly provided to the contrary in any NPA regulation or order, any provision of any NPA regulation or order applicable to any DO rating shall also be applicable to any DX rating. For example, in the case of an NPA order which provides for limitation on the acceptance of DO-rated orders by a supplier, a DX-rated order shall be considered, only for the purpose of such limitation, as though it were a DO-rated order.

(b) Rated orders shall have the following preferential status:

(1) All DX-rated orders will have equal preferential status. Any DX-rated order shall take priority over any unrated order or DO-rated order.

(2) All DO-rated orders will have equal preferential status. Any DO-rated order shall take priority over any unrated order.

(c) A rating shall have no effect on deliveries of orders calling for delivery of "controlled materials" as defined in CMP regulations or DMS regulations.

. . .

Section 16. Mandatory Orders and Directives.

Every person shall comply with each mandatory order and directive issued to him by NPA. Mandatory orders and directives issued by NPA take precedence over rated orders previously or subsequently received, unless a contrary instruction appears in the mandatory order or directive.

. . .

Section 27. Violations

Violation of any provision of this regulation may subject any person committing or participating in such violation to administrative action to suspend his privilege of making or receiving further deliveries of materials, or using materials or facilities, under priority or allocation control and to deprive him of further priority and allocation assistance. In addition to such administrative action, an injunction and order may be obtained prohibiting any such violation and enforcing

compliance with the provisions hereof. Any person who willfully violates any provision of this regulation or who willfully furnishes false information or conceals any material fact in the course of operation under this regulation is guilty of a crime and upon conviction may be punished by fine or imprisonment or both.

Supreme Court, U.S.
FILED
JUN 7 1995
OFFICE OF THE CLERK

Nos. 94-1557 and 94-1800

In the Supreme Court of the United States

OCTOBER TERM, 1994

HERCULES INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

VICKI L. PLAUT
ALBERT M. FERLO, JR.
JOHN A. SHEEHAN
SCOTT J. JORDAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the United States may be held liable under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a), as a person that "operated," or "arranged for [the] disposal * * * of hazardous substances" at, a facility used by petitioner Hercules Incorporated to manufacture the defoliant Agent Orange for sale to the government.

2. Whether Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, provides petitioner Hercules with immunity from, or requires the United States to indemnify it for, liability under CERCLA for environmental contamination caused by its manufacture of Agent Orange.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1557

HERCULES INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

No. 94-1800

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18)[1] is reported at 46 F.3d 803. The opinion of

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[1] Citations are to the appendix to the petition in No. 94-1557.

the district court (Pet. App. C1-C13) is reported at 841 F. Supp. 884.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1995. The petition for a writ of certiorari in No. 94-1557 was filed on March 21, 1995, and the petition in No. 94-1800 was filed on April 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed suit against petitioners Hercules Incorporated and Vertac Chemical Corporation, among others, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover the cost of remedying environmental contamination at a former chemical manufacturing site located in Jacksonville, Arkansas. These petitions arise out of the denial of petitioners' motions seeking summary judgment that the United States is jointly liable for the costs at issue under CERCLA, and that Section 707 of the Defense Production Act of 1950, 50 U.S.C. App. 2157, either shields petitioner Hercules from liability or requires that the United States indemnify Hercules for liability incurred by reason of its use of the Jacksonville site to manufacture the herbicide Agent Orange for sale to the government. The district court granted the government's cross-motion for summary judgment that the United States was not liable as an "operator" or "arranger" with respect to the Jacksonville facility, and that the Defense Production Act did not provide for the immunity or indemnity claimed by Hercules. The court

entered final judgment on those issues under Fed. R. Civ. P. 54(b), and the court of appeals affirmed.

1. The 93-acre manufacturing site involved in this case has been on the Environmental Protection Agency's national priority list since 1983. 40 C.F.R. Pt. 300, App. B (1993); see also *United States* v. *Vertac Chemical Corp.*, 489 F. Supp. 870, 873-874 (E.D. Ark. 1980). Petitioner Hercules acquired the property and its manufacturing facilities in December, 1961, and continued to use it to manufacture the herbicides 2,4-D and 2,4,5-T. Pet. App. A3. Shortly after purchasing the property, Hercules began disposing of waste left by the prior owner by digging trenches on the property, pushing the drums of waste into them, covering them with soil, and compacting the buried drums by repeatedly running over them with a bulldozer. Pet. App. C2; C.A. App. 2611 (Hercules Fact ¶ 142). Hercules used the same disposal practices during the ten years that it produced herbicides at the facility. Pet. App. A5. Petitioner Vertac's corporate predecessor began leasing the property from Hercules in 1971, and Vertac purchased it in 1976. Vertac closed the facility in 1986.

The manufacture of 2,4,5-T produces small amounts of a highly toxic by-product known as dioxin. Pet. App. A3 n.5. Early production processes used at the Jacksonville site incorporated most of the dioxin into the finished product, which was then shipped elsewhere. Petitioner Hercules later changed its production process, however, to remove the dioxin, producing manufacturing wastes containing most of the dioxin previously found in the final product.

Hercules sold its herbicide products, including 2,4-D and 2,4,5-T, to commercial customers during

the entire period that it operated the Jacksonville site. Pet. App. A6. Beginning in 1964, however, Hercules also submitted and won competitive bids for fourteen successive contracts to supply the United States with special mixtures, known as Agent Orange and Agent Purple, compounded from particular forms of 2,4-D and 2,4,5-T and used as defoliants by government forces operating in Vietnam. Pet. App. A3-A4; C.A. App. 2591-2593 (Hercules Fact ¶¶ 89, 95). The government contracts specified the proper form, packaging, labelling, and delivery of the desired product. Pet. App. A4.

Each of the government contracts, orders, and directives under which petitioner Hercules manufactured herbicides for the government included a "rating" allowing it to take priority over other contracts or orders. Each bidding package and contract set forth the applicable rating terms among many other standardized conditions, ranging from auditing and equal opportunity provisions to "buy American" certifications. Pet. App. A4; C.A. App. 2591 (Hercules Fact ¶ 90); C.A. Supp. App. 27-64 (bidding and contract forms); see *id.* at 29, 36. Each bidding package also contained provisions for withdrawing or altering bids. *Id.* at 30, 33. When Hercules returned bidding documents, they included the delivery schedule and defense order rating, price, and all other significant terms. The government then provided opportunities for negotiation of some of the contract terms. Pet. App. A4.[2]

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[2] Through its rated contracts with the United States, petitioner Hercules was able to obtain a priority from its suppliers for materials that would be used to fulfill the rated government contracts. Pet. App. A4. In March 1967, after

Becoming a government contractor also subjected Hercules to the terms of the Walsh-Healey Act. Pet. App. A4. That Act generally requires federal supply contracts involving more than $10,000 to stipulate, *inter alia*, that

> no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract.

41 U.S.C. 35(e). The Act also requires the contractor to pay minimum wages, to abide by forty-hour work week requirements, and not to hire minors or convicts. 41 U.S.C. 35.[3] Under its contracts, Hercules was required to comply with occupational health and safety standards promulgated by the Department of Labor. See 41 C.F.R. Pt. 50-204 (1963); 25 Fed. Reg. 13,809 (1960). Applicable regulations allowed the Department of Labor to conduct random inspections to monitor compliance with those standards. 41 C.F.R Pt. 50-205.9 (1963). Labor Department offi-

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petitioner had installed certain new equipment for which it had requested and obtained such priority delivery, the government issued a directive to Hercules to accelerate delivery of Agent Orange to a rate of 65,000 gallons per month. C.A. App. 2595 (Hercules Fact ¶ 102); Pet. App. A5.

[3] The Walsh-Healey Act is still in effect, but its worker safety provisions were incorporated into the more generally applicable Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

cials inspected the Jacksonville plant on two occasions during the four years that Hercules supplied defoliants to the government. Pet. App. A4-A5.

None of the supply contracts between the United States and Hercules addressed the disposal of hazardous substances. Pet. App. A5. Hercules buried wastes generated by its production processes before entering into its first government contract, and it continued to do so after filling its last government order. See Pet. App. A5-A6. Hercules personnel made decisions concerning waste disposal without direction of any kind from the United States. *Id.* at A6. Hercules never consulted government personnel involved in administering the supply contracts regarding burial or other waste disposal practices at the facility. C.A. App. 2612 (Hercules Fact ¶¶ 148-149).

The United States never participated in the management of petitioner Hercules' manufacturing facility. The government did not hire, train, manage, discipline, or fire petitioner's personnel. Pet. App. A5. It did not participate in accounting or bookkeeping activities, or share in profits or losses. It did not own any of the land, buildings, equipment, tools, or machinery used by petitioner. *Ibid.* The government did not design or implement petitioner's production process; it did not design, engineer or install production equipment; and it did not supply or own any of the raw materials that went into the product it purchased from petitioner. *Ibid.* Indeed, petitioner protected some aspects of its production process as proprietary information. *Ibid.*

Hercules made a profit for performing each rated contract for the supply of Agent Orange. Pet. App.

A6. After the government terminated its contracts for Agent Orange, Hercules continued producing similar commercial herbicides at the Jacksonville site. *Ibid.*

2. In 1980—before the enactment of CERCLA—the Environmental Protection Agency and the Arkansas Department of Pollution Control and Ecology entered into a consent order with petitioners Hercules and Vertac to address environmental contamination at the Jacksonville site. The district court approved that consent decree in January 1982. See *United States* v. *Vertac Chemical Corp.*, 588 F. Supp. 1294 (E.D. Ark. 1984). That decree did not succeed in resolving conditions at the site, however, and in 1992 the United States asserted CERCLA cost recovery claims against Hercules, Vertac, and others.

With one exception not relevant here, the district court has ruled on the liability aspect of all of the government's claims against private parties for CERCLA recovery costs. In particular, the court has granted summary judgment against petitioners Hercules and Vertac, among others, on the issue of liability (C.A. App. 6006-6010), leaving a variety of cost and allocation issues pending before the district court. Petitioners, however, also asked the district court to hold that CERCLA renders the United States liable for some share of the remedial costs, on the ground that, by means of its contracts for the supply of Agent Orange, the government either "operated" the Jacksonville facility or "arranged for disposal or treatment [there] * * * of hazardous substances owned or possessed by [the government]." 42 U.S.C. 9607(a)(2) and (3). Petitioner Hercules also claimed that Section 707 of the Defense Production Act (DPA), 50 U.S.C. App. 2157, either shielded it from,

or required the United States to indemnify it for, any CERCLA liability it might have incurred by using the Jacksonville site to manufacture Agent Orange.

The district court granted the government's cross-motion for summary judgment, holding that on the undisputed facts of this case the United States was neither an "operator" nor an "arranger" for purposes of CERCLA liability.[4] The court noted that the government never participated in actual management or daily operations of Hercules' manufacturing facility; never supplied, owned, or possessed the raw materials used to manufacture Agent Orange; and never dictated the manner in which Hercules was to dispose of manufacturing wastes. Pet. App. C9-C12. In sum, the court held that the government had no "authority over or involvement with Hercules' operations and decisions concerning the plant and the disposal of wastes." *Id.* at C12. The court rejected (*id.* at C11) petitioners' claim that any "compulsion" exerted by the United States under the Defense Production Act resulted in CERCLA liability on the part of the government: despite the government's power to require priority performance, the court held that for CERCLA purposes "the relationship between the United States and the contractor under the DPA

[4] The court held that there were questions of fact concerning the government's potential liability as the "owner" of an ordnance manufacturing facility located at the Jacksonville site during World War II. Pet. App. C12 n.4. The government has since settled claims of liability arising from that period by agreeing to pay $1.9 million toward the cost of restoring the site. See 59 Fed. Reg. 13,749 (1994). No objection or public comment was received concerning that settlement, and the district court approved it on June 30, 1994.

is one of buyer and seller." *Id.* at C10. The district court also rejected, without discussion, the argument that Hercules should be immunized from or indemnified for CERCLA liability under Section 707 of the DPA. *Id.* at C12.

The court of appeals affirmed. Pet. App. A1-A18. Applying the standard adopted by the full Third Circuit in *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843-845 (1994), the court held that the government's purchase of Agent Orange through rated contracts did not make it an "operator" of the Jacksonville facility for purposes of CERCLA because the facts revealed no "actual" and "substantial" control of the facility by the government. Pet. App. A8. The court noted in particular the absence of several factors found relevant in *FMC*, including "considerable day-to-day control," management and supervision of workers, and compulsion to produce a completely new product using new manufacturing processes. *Id.* at A9-A10. In this case, by contrast, the court concluded that "it cannot genuinely be disputed that the United States was never actively involved on a regular basis in, and thus never exerted substantial control over, operations at the Jacksonville facility." *Id.* at A10. The court found the health and safety regulations imposed by the Walsh-Healey Act "insufficient bases for imposing CERCLA liability on the United States." *Ibid.*

The court of appeals similarly rejected petitioners' claim that the United States should be held liable as an "arranger" under CERCLA. Pet. App. A11-A15. After noting that "arranger" liability requires proof that the defendant "owned or possessed" hazardous substances, the court explained that "a governmental entity may not be found to have owned or possessed

hazardous substances under [42 U.S.C.] § 9607(a)(3) merely because it had statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances." Pet. App. A12. The court rejected petitioners' argument that the terms of the Agent Orange supply contracts gave the government sufficient authority over petitioner Hercules to warrant holding that the government controlled the disposal of production wastes: Without ruling out the possibility that a government contract might involve "sufficient coercion or governmental regulation and intervention to justify the United States' liability as an arranger under CERCLA," the court held that "the undisputed facts of the present case do not support such a finding." *Id.* at A13. Similarly, without denying the ability to look beyond mere form in evaluating ownership or possession of hazardous materials, the court concluded that on the facts of this case the United States could not be held to have owned or possessed the raw materials obtained by Hercules or the work-in-process inventory that generated the wastes disposed of at the Jacksonville site. *Id.* at A14-A15.[5]

Finally, the court of appeals agreed with the reasoning of the Federal Circuit in *Hercules Inc.* v. *United States*, 24 F.3d 188, 203-204 (1994), cert. granted, 115 S. Ct. 1425 (1995) (No. 94-818), that Section 707 of the DPA "does not shield Hercules

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[5] The court of appeals declined to address the government's argument that the waiver of sovereign immunity in CERCLA did not permit the United States to be held liable on the basis of its regulatory activities under the Walsh-Healey Act. Pet. App. A15 n.10.

from liability it may have under CERCLA arising out of its performance of the Agent Orange contracts because such immunity would exceed the risk imposed by" the operative provisions of the DPA. Pet. App. A17. Moreover, having concluded that the DPA confers no immunity, the court also rejected the claim that the United States "implicitly promised to indemnify Hercules for the type of liability at issue in the present case." *Ibid.*

ARGUMENT

1. a. Petitioners contend (94-1557 Pet. 19-23; 94-1800 Pet. 19-21) that the courts of appeals have adopted different standards for determining "operator" liability under Section 107(a)(2) of CERCLA, 42 U.S.C. 9607(a)(2). As petitioners concede, most courts have imposed such liability only after finding that a party exercised substantial actual control over a particular facility. *E.g.*, *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc).[6] That is the standard that the court of appeals applied in this case. Pet. App. A7-A11. Petitioners argue, however, that the Fourth Circuit's statement in *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 842, cert. denied, 113 S. Ct. 377 (1992), that "authority to control—not actual control—[is] the appropriate standard"

[6] See also *United States* v. *Gurley*, 43 F.3d 1188, 1193 (8th Cir. 1994); *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994); *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.), cert. denied, 502 U.S. 1004 (1991); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985).

for operator liability creates a conflict of authority that requires resolution by this Court.

Nurad rejected claims of operator liability against former corporate tenants that, the court concluded, neither had nor exercised any authority over underground storage tanks on the contaminated property. *Nurad*, 966 F.2d at 843-844. In *United States* v. *Carolina Transformer Co.*, 978 F.2d 832, 836-837 (4th Cir. 1992), the same court affirmed judgments against a sole shareholder who admitted that he was "in charge" of the facility and "responsible" for the property in question, and against a director who admitted that "he operated or otherwise controlled operations on the property in question."[7] Neither case turned on any practical difference between the "actual control" and "authority to control" standards; indeed, *Nurad* cited, with apparent approval, two cases from other circuits that focused on the defendants' "actual conduct." 966 F.2d at 842.

Moreover, the discussion in *Nurad* makes clear that the Fourth Circuit's verbal formulation was intended primarily to impose liability on parties who willfully failed to act to prevent or mitigate environmental damage. *Nurad*, 966 F.2d at 842 (standard "properly declines to absolve from CERCLA liability a party who possessed the authority to abate the damage caused by the disposal of hazardous sub-

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[7] *Carolina Transformer* also relied explicitly (978 F.2d at 837) on the district court's recitation of the evidence, which included findings that one of the individual defendants "personally directed" operations at the facility, while the other incorporated a new business and surreptitiously continued repair and rebuilding work that caused environmental contamination. *United States* v. *Carolina Transformer Co.*, 739 F. Supp. 1030, 1033-1034 (E.D.N.C. 1989).

stances but who declined to actually exercise that authority by undertaking efforts at a cleanup."). As petitioner Hercules points out (94-1557 Pet. 20), that intention is consistent with prior cases from the court below. See *United States* v. *Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1382 (8th Cir. 1989). In the absence of more persuasive evidence that the courts are reaching (or even are likely to reach) inconsistent results on comparable facts, any difference in their expression of the applicable standard does not warrant intervention by this Court.

b. Petitioners also contend (94-1557 Pet. 25-28; 94-1800 Pet. 23-25) that the court of appeals' application of the "actual control" standard in this case conflicts with the Third Circuit's application of the same standard to different facts in *FMC Corp.* v. *United States Dep't of Commerce*, *supra*. As petitioners acknowledge (94-1557 Pet. 25; 94-1800 Pet. 23), the court below expressly adopted (Pet. App. A7) *FMC*'s articulation of the appropriate legal rule. Applying that rule, the court concluded that in this case, unlike in *FMC*, the United States did not "operate" the Jacksonville facility for purposes of CERCLA, because the government's contractual relationship with petitioner Hercules did not give it "actual or substantial control" (Pet. App. A11) of the facility and its waste disposal practices. The court's conclusion necessarily rests on "a fact-intensive inquiry and consideration of the totality of [the] circumstances." *Id.* at A8. In this Court, petitioners argue that the factual differences between this case and *FMC*, which the court of appeals found dispositive, were instead "immaterial" (94-1557 Pet. 25). That inherently fact-bound question does not merit further review.

In any event, whatever the merits of the *FMC* court's own conclusion on the facts of that case, the court of appeals properly distinguished this case from *FMC*. Pet. App. A8-A11; see generally C.A. App. 2848-2854 (comparison of factual findings). In this case, the United States was not "directly and entirely responsible for introducing a new manufacturing process" that generated hazardous wastes (Pet. App. A10); rather, the government contracted with petitioner Hercules to purchase a product compounded from "shelf-items," already produced by Hercules and commonly marketed in the private sector. See *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 817 (E.D.N.Y. 1984); see also *Ryan* v. *Dow Chemical Co.*, 781 F. Supp. 934, 950 (E.D.N.Y. 1992) ("The government sought only to buy ready-to-order herbicides."). The government did not ask or order Hercules to expand; it did not finance equipment purchases or own equipment outright; it did not supervise the construction of expanded facilities; and it did not help Hercules find or house its labor force. Compare Pet. App. A9 (quoting *FMC*, 29 F.3d at 843). Moreover, in this case the government did not "exert[] considerable day-to-day control over [the manufacturer] during the relevant time period" (Pet. App. A10, quoting *FMC*, 29 F.3d at 844); to the contrary, "it cannot genuinely be disputed that the United States was never actively involved on a regular basis in, and thus never exerted substantial control over, operations at the Jacksonville facility while Hercules was producing Agent Orange." Pet. App. A10.

The record therefore supports the court of appeals' conclusion that the government's contacts with Hercules—regulatory and contractual—were markedly fewer and less significant than those at issue in

FMC. There is no reason to speculate that the *FMC* court would have reached a different result on the facts of this case.

2. Petitioners argue (94-1557 Pet. 24-29; 94-1800 Pet. 25-28) that the court of appeals erred in holding that the government was not liable in this case as an "arranger" under Section 107(a)(3) of CERCLA, 42 U.S.C. 9607(a)(3). Much of that argument centers on a claim that the decision below is inconsistent with prior decisions from the same court of appeals. See 94-1557 Pet. 19-20, 24-25 (citing *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (*NEPACCO*), cert. denied, 484 U.S. 848 (1987), and *United States* v. *Aceto Agric. Chem. Corp.*, *supra*). That is not an appropriate ground for review by this Court. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In any event, the decision below is both correct and consistent. The court of appeals held (Pet. App. A11-A15) that the United States could not be held liable for "arrang[ing]" disposal of Hercules' production wastes because neither the government's regulatory powers under the Walsh-Healey Act, 41 U.S.C. 35, nor its contractual relationship with Hercules gave it "owne[rship] or "possess[ion]," for CERCLA purposes, of the hazardous substances that Hercules produced. 42 U.S.C. 9607(a)(3). In reaching that conclusion, the court discussed and properly distinguished (Pet. App. A12-A15) its prior decisions in *NEPACCO*, which held that a corporate employee could constructively "possess" hazardous materials if he "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of" them

(810 F.2d at 743), and *Aceto*, which concluded on particular facts that the defendant had continued to own (and thus control) materials that it sent to another party for processing (872 F.2d at 1381-1382).

In this case, by contrast, the government "did not immediately supervise, or have direct responsibility for, the transportation or disposal of any hazardous substances generated" by Hercules in Jacksonville, either by law or by contract (Pet. App. A13); nor did it own, possess, or supply either the raw materials used by Hercules or the company's work-in-process inventory (*id.* at A14-A15). The court of appeals therefore correctly concluded (*id.* at A15) that the government's "sporadic and minimal" involvement in the operation of the Jacksonville facility could not support a finding that the government "owned or possessed" Hercules' wastes and "arranged for [their] disposal" within the meaning of Section 107(a)(3).[8]

3. Petitioners Vertac and Arkansas urge the Court to grant review in order to consider the argument made by the government below (see Gov't C.A. Br. 32-38) that CERCLA's waiver of sovereign immunity (42 U.S.C. 9620(a)(1)) does not extend to any claim based on the government's unique responsibilities or powers under the Walsh-Healey Act and the Defense Production Act. 94-1800 Pet. i, 8-10, 12-19. Petitioners do not identify any conflict among the courts of appeals on this issue, and we are aware

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[8] Petitioner Hercules suggests (94-1557 Pet. 23-24) that the decision below on "arranger" liability may conflict with decisions of the Ninth and Second Circuits. Petitioner does not explain in what respect the decisions are inconsistent, and in our view they are not.

of none. See *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d at 838-842 (rejecting sovereign immunity argument under CERCLA). In any event, we agree, in general, with petitioners' contention that a court should determine jurisdictional issues before proceeding to the merits. And we agree that if the Court were to grant review in this case, the sovereign immunity issue would present a necessary and preliminary inquiry, which might obviate the need to reach other issues raised by petitioners. Nonetheless, the court of appeals declined to address the government's sovereign immunity argument in this case. Pet. App. A15 n.10. Petitioners therefore effectively prevailed on that issue in the court below, and it is not an appropriate ground on which they may seek further review. See *California* v. *Rooney*, 483 U.S. 307, 311-314 (1987).

4. Petitioner Hercules contends (94-1557 Pet. 29-31) that Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, provides it with "immunity for, and therefore an implied indemnity against, CERCLA liability" (94-1557 Pet. 29).

a. The court of appeals properly rejected petitioner's immunity claim. Pet. App. A15-A17. Whatever the merits of that claim, it is not properly presented here. Petitioner appears to have asserted a DPA immunity defense in its initial answer to the government's complaint against it. See Answer and Counterclaim of Hercules Incorporated 3 (E.D. Ark. No. LR-C-92-137). The issue of liability in that action has since been resolved by the district court's entry of summary judgment against petitioner (C.A. App. 6006-6010), but that judgment has not become final, both because of remaining liability issues involving

other parties, and because of cost determination and allocation issues that remain pending before the district court. This petition, by contrast, arises from a counterclaim brought by petitioner against the government. See Pet. App. C1, D1; C.A. App. 824, 838-839. Only a claim for indemnity by the United States—not a claim for immunity from petitioner's own liability under CERCLA—could constitute one of the "claims against the United States" on which the judgment at issue here was entered. Pet. App. D1.

b. The court of appeals also correctly rejected petitioner's claim of an "implied indemnity" under Section 707. Pet. App. A17. Moreover, petitioner has never made clear either the legal source of its claim, or the jurisdictional basis for consideration of that claim by the district court.

Petitioner has disclaimed the existence of any contractual right to indemnity. Hercules C.A. Br. 48 ("Here, there is no contract of indemnification."). In the court of appeals, petitioner argued instead that the "public polic[ies]" underlying CERCLA and the DPA "intersect to form an implied indemnity by the United States." *Id.* at 49. That novel theory depends on the resolution, in favor of petitioner, of the other questions on which petitioner seeks review here —the United States' liability under CERCLA, and petitioner's immunity under the DPA. Those questions do not, as we have explained, warrant further proceedings in this case; and petitioner's derivative indemnity claim provides no independent basis for review.

In any event, whatever the source of petitioner's claim, it seeks recovery of more than $10,000, and therefore falls within the exclusive jurisdiction of the United States Court of Federal Claims. See 28

U.S.C. 1491(a)(1); see also 28 U.S.C. 1346(a)(2). If petitioner believes that Section 707 entitles it to indemnity from the United States for any liability it has incurred under CERCLA by reason of its manufacture of Agent Orange, it must wait for that liability to be finally determined, and then bring a claim against the United States in the appropriate forum.

The point is illustrated by the history of litigation over tort liability for alleged defects in the Agent Orange manufactured by petitioners and others. Petitioner ultimately settled the tort claims against it —after having properly raised the DPA immunity issue as a defense to liability in those actions. See *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 843-845 (E.D.N.Y. 1984) (discussion of DPA claim in opinion approving settlement), aff'd, 818 F.2d 145 (2d Cir.), cert. denied, 484 U.S. 1004 (1988). Petitioner then sought to recover its costs of litigation and settlement from the United States by filing a new action, based on a variety of contractual theories, in the Court of Federal Claims. Although petitioner raised no DPA indemnity claim in that litigation, another party did advance an indemnity argument based on Section 707. Both the Court of Federal Claims and the Court of Appeals for the Federal Circuit rejected that theory, but this Court has since granted review in the case, which is now awaiting briefing and argument. *Hercules, Inc.* v. *United States*, No. 94-818.

This Court's decision in No. 94-818 might well shed light on the legal merit of the DPA indemnity claim that petitioner seeks to raise here, in No. 94-1557. Nothing in the Court's decision, however, will remedy any jurisdictional defect in this case, or ren-

der appropriate for review in this case the CERCLA and DPA immunity issues on which the indemnity theory framed by petitioner depends. There is therefore no reason to hold the petition in No. 94-1557 pending argument and decision of No. 94-818.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

VICKI L. PLAUT
ALBERT M. FERLO, JR.
JOHN A. SHEEHAN
SCOTT J. JORDAN
Attorneys

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No. 94-1800

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
And
VERTAC CHEMICAL CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION

SCOTT E. SLAUGHTER*
SIMON E. DANCE
COFFIELD UNGARETTI & HARRIS
1747 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20006
(202) 872-4310

Counsel For Petitioner, Vertac Chemical Corporation

**Counsel of Record*

WINSTON BRYANT*
ATTORNEY GENERAL and
CHARLES L. MOULTON
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
323 Center Street, Suite 200
Tower Building
Little Rock, Arkansas 72201-2610
(501) 682-2007

Counsel for Petitioner, Arkansas Department of Pollution Control and Ecology

Balmar Legal Publishing Services (202) 682-9800

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Appellee's, United States', Petition for Rehearing and Suggestion of Rehearing *In* [sic] *Banc* and Addendum A thereto, *FMC Corp. v. United States Dept. of Commerce, 29 F.3d 833 (3rd Cir. 1994) (en banc)* 3

ARGUMENT

The United States' Standing Argument Is Without Merit

The United States agrees with Petitioners that the courts below had a duty to determine whether they had jurisdiction to decide the CERCLA[1] claims against the United States before proceeding to the merits. (Br. at 17). The United States also agrees that the courts below failed to perform this duty. *Id.* Furthermore, the United States agrees that if this Court grants certiorari in this case, the "sovereign immunity issue would present a necessary and preliminary inquiry. . . ." *Id.* Notwithstanding these concessions, however, the United States apparently argues that Petitioners somehow lack standing to raise this issue. *Id.* This argument is without merit.

The United States cites *California v. Rooney*, 483 U.S. 307, 311-14 (1987), for the proposition that Petitioners may not seek further review of the jurisdictional issue. This case, however, is inapposite because it did not involve any jurisdictional issue. Jurisdictional issues can be raised by any party at any time, even if they were never raised in earlier stages of the litigation. All federal courts, including the Supreme Court, have a duty *sua sponte* to determine as a threshold question whether they and the lower courts have jurisdiction over the merits of claims, even if no party challenges the courts' jurisdiction. *See, e.g., Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *Allen v. Wright*, 468 U.S. 737, 750 (1984). Thus, the Supreme Court would be required to address this jurisdictional issue even if Petitioners had not raised it.

The United States contends that Petitioners lack standing because they "effectively prevailed" on the merits of the sover-

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[1] "CERCLA" is the acronym for the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.*

eign immunity issue. (Br. at 17). This argument is simply wrong. As the United States is fully aware, the courts below never decided the sovereign immunity jurisdictional issue. Instead, the Eighth Circuit expressly stated that its decision on the merits in favor of the United States obviated the need to decide this issue. *See United States of America v. Vertac Chem. Corp.*, 46 F.3d 803, 811 n.10 (8th Cir. 1995); Petitioners' Brief, App. A-15 n.10. There is no reason to believe that the courts below would have held that there was a sovereign immunity waiver if they had decided this jurisdictional issue. And there are significant differences for Petitioners between a dismissal on jurisdictional grounds and a loss on the merits:

> The collateral ramifications of a decision on the merits are clearly different from those that attend a dismissal on jurisdictional grounds. Res judicata, for example, will only attach to a decision on the merits. Private agreements among the parties or between the parties and their attorneys or indemnitors may also be affected by the form of the court's decision.

Clow v. United States Dept. of Housing and Urban Dev., 948 F.2d 614, 627 n.4 (9th Cir. 1981) (*per curiam*). Consequently, Petitioners had, and continue to have, a very great interest in having this jurisdictional issue decided first.

Furthermore, the United States argues that there is no "conflict among the courts of appeals [sic] on this issue. . . ." (Br. at 16). This argument is also incorrect. The United States Court of Appeals for the Third Circuit, in a case involving the same or similar issues, correctly addressed the sovereign immunity issue first, and only addressed the merits of the CERCLA claims against the United States after determining that there was a waiver of sovereign immunity. *FMC Corp. v. United States Dept. of Commerce,* 29 F.3d 833, 838-42 (3rd Cir. 1994) (*en banc*). There is at least a conflict in principle between the Third Circuit's correct approach to this issue and the Eighth Circuit's

mistaken belief that it need not address the threshold sovereign immunity issue at all. According to the United States, there are some twenty-four (24) other pending cases which present the same, or similar, issues of government CERCLA liability.[2] Given the likelihood of further inconsistent interpretations by the federal courts, this Court should instruct the lower courts that they are to adopt the Third Circuit's correct approach to this issue, and not follow the Eighth Circuit's avoidance of it.

This jurisdictional issue manifestly transcends CERCLA. The Eighth Circuit's holding in this CERCLA case is precedent for ignoring jurisdictional issues in any type of proceeding. For example, the United States Court of Appeals for the Ninth Circuit has consistently held in non-CERCLA cases that it can ignore sovereign immunity and other jurisdictional issues if it decides claims on the merits in favor of the defendants. *E.g., Clow*, 948 F.2d at 616 n.2. The United States Court of Appeals for the D.C. Circuit has reached similar holdings. *E.g., Cross-Sound Ferry Servs., Inc. v. I.C.C.*, 934 F.2d 327, 333 (D.C. Cir. 1991). Both Courts of Appeals believe that their decisions are justified on the basis of the so-called "hypothetical jurisdiction" doctrine. The decisions in both Courts of Appeals are subject to scathing dissents, including then Circuit Judge Clarence Thomas's dissenting opinion in *Cross-Sound Ferry Servs.*, 943 F.2d at 335-46, which explained clearly that there is no constitutional basis for courts assuming jurisdiction and ruling on the substantive merits. *Accord Clow*, 948 F.2d at 619, 625-28 (O'Scannlain, C.J., dissenting) (relying in large part on Justice Thomas's dissent in *Cross-Sound Ferry Servs.*).

Absent holdings to the contrary by this Court or the Courts of Appeals sitting *en banc*, however, there is no authority to overrule the decisions of these courts. The decisions thus re-

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[2] Appellee's, United States', Petition for Rehearing and Suggestion of Rehearing *In* [sic] *Banc* at 14 and n.6, and Addendum A thereto at 20, *FMC Corp. v. United States Dept. of Commerce*, 29 F.3d 833 (3rd Cir. 1994) *(en banc)*.

main binding precedent on the scope of those courts' jurisdiction. *See, e.g., Koff v. United States*, 3 F.3d 1297, 1299 (9th Cir. 1993). This Petition presents the Supreme Court with a vehicle for, *inter alia*, providing unequivocal guidance to the federal courts on one of the most fundamental principles of federal jurisprudence: A federal court must always address its subject matter jurisdiction first; if there is no jurisdiction, then the claims must be dismissed. This fundamental principle is now being ignored in at least three different Courts of Appeals.

The United States' New Jurisdictional Argument On Hercules's DPA Claims Requires Supreme Court Review

Ironically, the United States now argues that the Defense Production Act ("DPA")[3] indemnification issues raised by Hercules in its Petition For A Writ Of Certiorari (No. 94-1557) should not be reviewed by this Court because the courts below lacked jurisdiction to decide them. (Br. at 18-20). However, the United States never made this jurisdictional argument below. Instead, the United States — without objecting to the District Court's jurisdiction and after successfully seeking affirmation of the lower court's decision on the merits in the Court of Appeals — only argued against Hercules's DPA claims on the merits.

This new argument ignores the actual holdings below.[4] The courts below only addressed Hercules's DPA claims on the merits, and only held against Hercules on the merits. If the courts below lacked jurisdiction over these DPA claims, then their decisions on the merits of those claims must also be vacated by this Court. Otherwise the Eighth Circuit's decision on the merits will be res judicata on claims which the courts lacked jurisdiction to decide.

[3] 50 U.S.C. app. §§ 2061 *et seq.*

[4] Moreover, Petiioners note that the United States' indemnification argument is, in part, confusing and incomprehensible. *See, e.g.*, Br. at 18.

The Supreme Court has already granted certiorari on Hercules's related DPA indemnification claims in the United States Court of Appeals for the Federal Circuit (No. 94-818). The United States suggests that this Court should deny review of Hercules's DPA indemnification claims in the Eighth Circuit because the Court's decision on the Federal Circuit claims may "shed light" on the Eighth Circuit claims. That "light" may be extinguished if the Court follows the United States' suggestion. The Eighth Circuit's decision on the merits of Hercules's DPA claims will be res judicata if this Court denies Hercules's Petition For A Writ Of Certiorari in No. 94-1557, regardless of the Court's subsequent decision on the Federal Circuit claims in No. 94-818.

CONCLUSION

Both the Eighth Circuit and Federal Circuit Petitions contain overlapping DPA indemnification issues. These DPA issues also affect the merits of the CERCLA claims against the United States, which rely heavily on the United States' actions and authority under the DPA. Accordingly, the Eighth Circuit Petitions should be granted certiorari and consolidated with the related Federal Circuit opinion which has already been granted certiorari in No. 94-818. In the alternative, the Court should vacate the Eighth Circuit's decision on all issues and remand with instructions to the lower courts to determine whether they have jurisdiction over both the CERCLA claims and the DPA indemnification claims against the United States. At the very least, the Court should stay action on all petitions for review of the Eighth Circuit's opinion pending the Court's decision on the Federal Circuit DPA indemnification claims in No. 94-818.

Whatever the thrust of the United States' contention, Petioners fail to understand how a "claim for indemnity by the United States . . . could constitute one of the 'claims against the United States' . . . ." *Id.*

Respectfully submitted,

SCOTT E. SLAUGHTER*
SIMON E. DANCE
COFFIELD UNGARETTI & HARRIS
1747 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20006
(202) 872-4310

Counsel for Petitioner
Vertac Chemical Corporation

**Counsel of Record*

WINSTON BRYANT*
ATTORNEY GENERAL and
CHARLES L. MOULTON
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
323 Center Street, Suite 200
Tower Building
Little Rock, Arkansas 72201-2610
(202) 872-4310

Counsel for Petitioner,
Arkansas Department of Pollution
Control and Ecology